TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

No. 123.

JOHN C. GOODRICH AND CLARENCE M. BURTON,
PLAINTIFFS IN ERROR,

vs.

THE CITY OF DETROIT AND LOUIS B. LITTLEFIELD,
TREASURER OF THE CITY OF DETROIT.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

FILED JULY 31, 1900.

(17,853.)

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INDEX.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., SEPTEMBER 11, 1901.

1 STATE OF MICHIGAN:

Supreme Court.

JOHN C. GOODRICH and CLARENCE M. BURTON, Complainants and Appellants,
vs.
THE CITY OF DETROIT and LOUIS B. LITTLEFIELD, Defendants and Appellees.

Bill of Complaint.

STATE OF MICHIGAN:

Circuit Court for the County of Wayne. In Chancery.

Your orators, John C. Goodrich and Clarence M. Burton, of the city of Detroit, in said county of Wayne, respectfully show unto the court:

1. That they are the owners of lots numbers sixty-six (66), sixty-nine (69), seventy (70), eighty (80), eighty-one (81), eighty-four (84), eighty-five (85), eighty-six (86), eighty-seven (87), eighty-eight (88), eighty-nine (89), ninety-six (96), ninety-seven (97), ninety-eight (98), ninety-nine (99), one hundred (100), one hundred one (101), one hundred two (102), one hundred three (103), one hundred four (104) and one hundred five (105), of Goodrich & Burton's subdivision of part of section twenty-eight (28), town fifteen (15), range twelve (12) east, being in the city of Detroit, in said county and State.

2. That on the fourteenth day of November, A. D. 1893, a resolution was passed by the common council of the city of Detroit, declaring the opening and extending of Milwaukee avenue, between Chene street and Mt. Elliott avenue (where not already opened sixty feet wide, except between the Boulevard and Collins street, where said avenue shall be the average width of 67.10 feet), for the use and benefit of the public as a public street and highway, to be necessary, a certified copy of which resolution was attached to the petition filed in the recorder's court, a copy of which petition and resolution is hereto attached, marked Exhibit "1."

3. That afterwards, on the sixth day of January, 1894, the petition of the City of Detroit for the opening and extending of Milwaukee avenue betwe-n Chene street and Mt. Elliott avenue, was filed in the recorder's court of the city of Detroit, a copy of which petition is hereto attached marked Exhibit "1."

2 4. That on the eighth day of January, 1894, a summons was issued, returnable on February 5th, 1894. That on the fifth day of February, 1894, an order was entered requiring the sheriff to return a list of twenty-four freeholders of the city of Detroit, on the tenth day of February, 1894, at nine o'clock a. m., and on the twelfth day of February, 1894, a jury was struck, and an order fixing the hearing for the nineteenth day of February, at ten o'clock in the forenoon, and ordering a venire to be issued, returnable at that time.

That on the nineteenth day of February, 1894, the following entry was made in the journal of the recorder's court:

"In the matter of opening and extending Milwaukee avenue, between Chene street and Mt. Elliott avenue, where not already opened sixty feet wide (except between the Boulevard and Collins street, where said avenue shall be an average width of 67.10 feet), for the use and benefit of the public as a public street and highway, in the city of Detroit.

A venire having been duly issued by the clerk of this court in obedience to an order heretofore entered commanding the sheriff of Wayne county to summons the persons therein named to appear in this court on this day to serve as jurors in this matter, and said venire having been duly returned served, and all the persons therein summoned having appeared and answered to their names when called except Thomas Currie, who is excused by the court, he being ineligible under the statute, the court proceeded to impanel the jury from the persons so summoned and remaining. (Here follows eleven names.) It appearing to the court that a sufficient number of qualified persons are not in attendance to serve as jurors in this matter, it is ordered that the sheriff of the county of Wayne summon one person possessing the necessary qualifications, to serve as a talesman in the matter. In obedience to said order, Charles T. Beilman is so summoned, appears in open court, answers to his name, takes a seat in the jury-box. Thereupon the jury was impaneled, named (here follows twelve names), are duly elected, tried and sworn in the manner prescribed by law, sit together, and in charge of an officer view the property to be taken and are excused by the court Thursday, the 1st day of March, A. D. 1894, at nine o'clock in the forenoon local time."

5. On the sixth day of March, A. D. 1894, the following entry appears on the journal of the recorder's court of the city of Detroit:

3 "In the matter of the opening and extending Milwaukee avenue between Chene street and Mt. Elliott avenue, where not already opened sixty feet wide (except between the Boulevard and Collins street, where said avenue shall be an average width of 67.10 feet), for the use and benefit of the public as a public street and highway, in the city of Detroit.

The jury heretofore impaneled in this cause came into court again, heard the conclusion of the evidence in the case, the arguments of counsel and the instructions of the court as to their duties and the law of the case, and retire under charge of an officer, duly sworn to attend to them to consult upon their verdict. Having been absent for a time, return into court, and having been inquired of as to their verdict, say, upon their oath aforesaid, that they have agreed upon a verdict in favor of said opening, which they present to the court in writing. Thereupon it is ordered by the court that said verdict be filed."

(A copy of which verdict is hereto attached, marked Exhibit "2."

And on May 7th, 1894, the following entry was made:

"In the matter of the opening and extending Milwaukee avenue between Chene street and Mt. Elliott avenue, where not already opened sixty feet wide (except between the Boulevard and Collins street, where said avenue shall be an average width of 67.10 feet) for the use and benefit of the public as a public street and highway, in the city of Detroit.

In this cause no motion for a new trial or to rest the proceedings having been made, and two days having elapsed since the rendition of the verdict, on motion of Frank A. Rasch, city attorney, it is ordered by the court now here that the verdict of the jury in this matter be and the same is hereby in all things confirmed."

6. That the above comprises all the orders made in said case, so far as they appear on the journals of said court.

7. That on the seventh day of August, 1894, a resolution was adopted by the common council as follows:

"Resolved, That the common council of the city of Detroit do hereby fix and determine that the following district and portion of said city of Detroit, to wit (here follows descriptions) is benefited by the opening of Milwaukee avenue from Chene street to Mt. Elliott avenue, where not already opened. And further resolved, That there be assessed and levied upon the several pieces and parcels of real estate included in the above description, the amount of $15,214.75 in proportion, as near as may be, to the advantage which such lot or parcel is deemed to acquire by such improve-
4 ment. And further resolved, That the board of assessors of said city of Detroit be, and they are hereby, directed to proceed forthwith to make an assessment-roll in conformity with the requirements of the charter of the city of Detroit, relating to special assessments for collecting the expense of public improvements when a street is graded, comprising the property hereinbefore described, upon which they shall assess and levy the amount of $15,214.75, each lot or parcel to be assessed a ratable proportion, as near as may be, of said amount, in accordance to the amount of benefit derived for such improvements."

8. On the twenty-fifth day of September, 1894, the assessors reported assessment-roll number 58 for defraying the expense of opening Milwaukee avenue, which was laid on the table.

9. On the second day of October, 1894, the assessment-roll was reported by the committee on street opening and confirmed by the council.

10. On November twentieth, 1894, the following resolution was passed by the common council:

"Resolved, That the resolution passed by this council October 2d, 1894, confirming the street assessment-roll number 58, for defraying part of the expense of and costs of opening Milwaukee avenue be, and the same is hereby, rescinded."

11. On the twenty-second day of January, 1895, the following resolution was adopted by the common council:

"Resolved, That the said council of the city of Detroit, do hereby fix and determine that the following district and portion of said city of Detroit, to wit: (Here follows list of descriptions, many of which

are different from those in first assessment district) is benefited by the opening of Milwaukee avenue from Chene street to the easterly city limits, where not already opened; and further resolved, that there be assessed and levied upon the several pieces and parcels of real estate included in the above descriptions, the amount of $15,214.75, in proportion, as near as may be, to the advantage which each each lot or parcel is deemed to acquire by this improvement. And further resolved, that the board of assessors of said city of Detroit be, and they are hereby, directed to proceed forthwith to make an assessment-roll in conformity with the requirements of the charter of the city of Detroit relating to special assessments for collecting the expense of public improvements when a street is graded, comprising the property hereinbefore described, upon which they shall assess and levy the amount of $15,214.75, each lot or parcel to be assessed a ratable proportion, as near as may be, of said amount, in accordance to the amount of benefit derived by such improvements."

5 12. On the twelfth day of March, 1895, the assessors reported a new assessment-roll number 58, for defraying the expenses of opening Milwaukee avenue, which was referred to the committee on street openings.

13. On the fourth day of April, 1895, the following action was taken by the common council:

"To the honorable the common council:

GENTLEMEN: Your committee on street openings, to whom was referred the communication of the board of assessors transmitting the new assessment-roll for defraying the expense and cost of taking private property for the opening of Milwaukee avenue, from Chene street to Mt. Elliott avenue, said assessment-roll was advertised February 26th, 27th, and 28th, and March 1st and 2d, 1895—respectfully report, that we have carefully examined the matter and recommend that said assessment-roll be confirmed, and herewith offer the following resolution.

Respectfully submitted,

E. B. WELTON.
JOHN F. HACKER.
ANTHONY WEILER.

Accepted, and on leave the following resolution was offered by Alderman Welton:

Resolved, That the common council of the city of Detroit, do hereby approve and confirm street opening assessment-roll No. 58, for defraying the expense and cost for taking private property for the opening of Milwaukee avenue from Chene street to Mt. Elliott avenue, where not already opened.

Adopted. Yeas, 19; nays, none.

14. That your orators' lands are worth upwards of one hundred dollars, and were assessed on said assessment-roll for the following amounts, respectively:

Lot No.	66,	Goodrich & Burton's subdivision of part of section 28, town 14, range 12 east				.....	$5.00
" "	69,	"	"	"	"	.....	5.00
" "	70,	"	"	"	"	.....	5.00
" "	80,	"	"	"	"	.....	60.00
" "	81,	"	"	"	"	.....	67.00
" "	84,	"	"	"	"	.....	67.00
" "	85,	"	"	"	"	.....	67.00
" "	86,	"	"	"	"	.....	67.00
" "	87,	"	"	"	"	.....	67.00
" "	87,	"	"	"	"	.....	67.00
" "	88,	"	"	"	"	.....	67.00
" "	89,	"	"	"	"	.....	67.00
" "	96,	"	"	"	"	.....	72.00
" "	97,	"	"	"	"	.....	72.00
" "	98,	"	"	"	"	.....	72.00
" "	99,	"	"	"	"	.....	72.00
" "	100,	"	"	"	"	.....	72.00
" "	101,	"	"	"	"	.....	77.00
" "	102,	"	"	"	"	.....	77.00
" "	103,	"	"	"	"	.....	77.00
" "	104,	"	"	"	"	.....	77.00
" "	105,	"	"	"	"	.....	77.00

6 15. Your orators further show that none of the above-described lands assessed for the opening of said street, abut upon those parts of the street which were opened by these proceedings, but that your orators at the time said land was platted, dedicated to the city of Detroit all that portion of Milwaukee avenue lying in front of these lands and included in Goodrich's & Burton's subdivision of part of section 28, town 14, range 12 east, without cost or expense to the city.

16. That the receiver of taxes returned said several descriptions as delinquent for said taxes, and the same were sold for said taxes and bid off to the City of Detroit for ninety-nine years, and the city now claims to hold the same under said sale.

17. Your orators allege that said taxes are invalid for the following reasons:

(*a.*) Because the resolution of the common council declaring the necessity for the opening of said street was passed at the same meeting at which it was introduced, without unanimous consent being given therefor.

(*b.*) Because the resolution of the common council declaring the necessity of opening said street does not describe the land to be taken for such improvement.

(*c.*) Because the petition filed by the city attorney in the recorder's court, for the condemnation of lands for the opening of Milwaukee avenue, does not describe the several parcels of land to be taken for such improvement.

(*d.*) Because the certified copy of the resolution of the council filed

with the city attorney, and attached to the petition, does not describe the several parcels of land to be taken for such improvement.

(*e.*) Because the verdict of the jury rendered in said cause, does not describe the several parcels of land to be taken for such improvement.

(*f.*) Because the jury were not sworn, as required by section 3064 G of Howell's Statutes.

(*g.*) Because the oath administered to the jury did not describe the several parcels of land to be taken for such improvement.

(*h.*) Because a large part of the land for which damages were allowed by the jury, and for which the assessment was made, was not condemned.

(*i.*) Because the lands belonging to your orators, above described, did not abut on those parts of Milwaukee avenue which were opened, and said lands were not liable to be assessed therefor.

7 (*j.*) Because the verdict of the jury does not fix the amount of damages allowed for each piece of land separately.

(*k.*) Because it appears from the verdict of the jury that the damages allowed for certain parcels of land, were stipulated by the parties and not allowed by the jury.

(*l.*) Because the verdict of the jury is unintelligible.

(*m.*) Because the petition, with a certified copy of the resolution declaring the necessity for the opening of Milwaukee avenue attached thereto, was submitted to the jury.

(*n.*) Because the resolution of the common council fixing the assessment district, does not find and determine that the portion of the city embraced in the assessment district was benefited by the improvement in the sum of $15,214.75, the amount of the entire award.

(*o.*) Because there is no finding by the common council of the amount the lands included in said assessment district were benefited by the improvement.

(*p.*) Because such assessment was not made in the manner required by statute and the charter of the city of Detroit, or as directed by the resolution of the common council.

(*q.*) Because section 3406 of the Compiled Laws of the State of Michigan of 1897, is in violation of article 6, section 32 of the constitution of the State of Michigan, forbidding the depriving of any person of life, liberty or property without due process of law.

(*r.*) Because the resolution of the common council directing the assessment, and the assessment made in pursuance of said resolution, upon complainant's lands, by the common council of the city of Detroit, was in violation of article 6, section 32 of the constitution of the State of Michigan.

(*s.*) Because section 3406 of the Compiled Laws of the State of Michigan of 1897, is in violation of the 14th amendment to the Constitution of the United States, forbidding any State from depriving a person of property, without due process of law.

(*t.*) Because the resolution of the common council directing the assessment, and the assessment made in pursuance of said resolution,

upon complainant's lands, for the opening of said street, was in violation of the 14th amendment of the Constitution of the United States, forbidding any State from depriving a person of property without due process of law.

(*u.*) Because section 3406 of the Compiled Laws of the State of Michigan of 1897, is in violation of article 6, section 32 of the constitution of the State of Michigan, because it does not require that the portion of the award of the jury which the common council may order to be assessed upon said assessment district, shall not exceed the total amount of the benefit derived by the lands in said district from such improvement.

8 (*v.*) Because section 3406 of the Compiled Laws of the State of Michigan, of 1897, is in violation of the 14th amendment to the Constitution of the United States, because it does not require that the portion of the award of the jury which the common council may order to be assessed upon said assessment district, shall not exceed the total amount of the benefits derived by the lands in said district from such improvement.

(*w.*) Because the resolution of the common council of the city of Detroit, directing said assessment, is in violation of article 6, section 32, of the constitution of the State of Michigan, because it does not determine or find that the property included in the assessment district is benefited to the amount of the assessment.

(*x.*) Because the resolution of the common council of the city of Detroit, directing said assessment, is in violation of the 14th amendment to the Constitution of the United States, because it does not determine or find that the property included in the assessment district is benefited to the amount of the assessment.

18. Your orators further show that Louis B. Littlefield is the treasurer of the city of Detroit.

19. Your orators further show that said taxes are an apparent cloud upon the title of your orators to said land, and your orators fear that the said Louis B. Littlefield, treasurer of the city of Detroit, will sell the said land for such taxes, unless restrained from so doing by this honorable court.

20. Your orators therefore pray that the said defendants, The City of Detroit and Louis B. Littlefield, treasurer of the city of Detroit, may, without oath (their answers under oath being hereby expressly waived), full, true and perfect answer make to all and singular the matters herein contained and stated, as fully and particularly as if the same were repeated and they thereto distinctly interrogated.

21. That the said taxes assessed on said several descriptions of land, for the opening of said Milwaukee avenue, may, by the order of this court, be declared to be void, and be set aside, and the cloud created thereby upon the title of your orators to said land, may be removed, and that the said City of Detroit, and Louis B. Littlefield, treasurer of the city of Detroit, may, by an injunction, issued out of and under the seal of this court, be perpetually restrained from advertising and selling, or attempting to advertise and sell, the lands hereinbefore described, or any of them, for the said taxes assessed thereon, and that your orators may have such other and further

relief in the premises as may be agreeable to equity and good conscience, and as to the court shall seem meet.

9 22. May it please the court, the premises being considered, to grant to your orators the writ of subpœna, to be issued out of and under the seal of this court, to be directed to the said City of Detroit, and Louis B. Littlefield, treasurer of the city of Detroit, defendants herein, thereby commanding them, and each of them, on a certain day and under a certain penalty to be therein inserted, personally to be and appear before this court, then and there to answer all and singular the said premises, and to stand to, abide and perform such order and decree as this court shall make therein, and as shall be agreeable to equity and good conscience, and your orators will ever pray, etc.

JOHN C. GOODRICH AND
CLARENCE M. BURTON,
Complainants.

BACON & PALMER,
Solicitors for Complainants.

10 EXHIBIT "I."

STATE OF MICHIGAN:

In the Recorder's Court of the City of Detroit.

To the recorder's court of the city of Detroit:

Your petitioner, The City of Detroit, a municipal corporation, by Frank A. Rasch, its city attorney, respectfully shows unto the court as follows:

First. That this petition is made and filed as commencement of judicial proceedings by your petitioner, The City of Detroit, in pursuance of an act entitled "An act to authorize cities and villages to take private property for the use or benefit of the public, and to repeal act number twenty-six, of the public acts of eighteen hundred and eighty-two," being act number one hundred and twenty-four, of the public acts of eighteen hundred and eighty-three, as amended March 29, 1887, and July 3, 1889, to acquire the right to take private property for the use and benefit of the public, without the consent of the owners, for a public improvement, to wit:

"Opening and extending Milwaukee avenue between Chene street and Mt. Elliott avenue where not already opened sixty feet wide (except between the Boulevard and Collins street where said avenue shall be an average width of 67.10 feet) for the use and benefit of the public as a public street and highway,"

and for a just compensation to be made.

Second. That in making and maintaining the proposed improvement, a perpetual right of way over the different pieces or parcels of private property, hereinafter described, will be necessary; and that such right of way is proposed to be used for the purpose of a public street and highway.

11 Third. That the common council of said city of Detroit, by a resolution duly passed and adopted by said common council, on the 14th day of November, A. D. 1893, and duly approved by the mayor of said city, on the 21st day of November, A. D. 1893, have declared such public improvement, to wit:

"opening and extending Milwaukee avenue, between Chene street and Mt. Elliott avenue where not already opened sixty feet wide (except between the Boulevard and Collins street where said avenue shall be an average width of 67.10 feet) for the use and benefit of the public as a public street and highway,"

to be necessary, and that they deem it necessary to take the private property described in that behalf, for such public improvement, for the use and benefit of the public, and that in making such public improvement, they deem it necessary to take said private property therefor.

Fourth. That a copy of said resolutions, certified under seal by the clerk of said city of Detroit, was duly served by said clerk upon the city attorney of said city, and is hereto attached, marked Exhibit "A," and made a part of this petition.

Fifth. That the different pieces or parcels of real estate being lots, tracts, and private property in said city of Detroit, proposed to be taken for said public improvement to wit:

"opening and extending Milwaukee avenue between Chene street and Mt. Elliott avenue, where not already opened sixty feet wide (except between the Boulevard and Collins street, where said avenue shall be an average width of 67.10 feet) for the use and benefit of the public as a public street and highway,"

as described in said resolution, together with the names of the owners and occupants of and others interested in said lots, tracts and parcels, respectively, as far as the same can be ascertained, are stated below to wit:

Description of each of the several parcels of private property proposed to be taken.		Names of persons interested.	The interest of each.
All that part of outlot eleven (11) of Theodore J. and Denis J. Campau plat of the subdivision of fractional section No. twenty-nine (29) and thirty-two (32), town one (1) south range 12 east, described as follows: Commencing at the southwesterly corner of said outlot eleven (11), thence north sixty-four (64) degrees east, seven hundred and eleven and eighty-five-hundredths (711.85) feet. Thence north twenty-six (26) degrees west sixty (60) feet. Thence south sixty-four (64) degrees west six hundred and eighty-three and eighty-one-hundredths (683.81) feet; thence south fifty-seven (57) minutes east, sixty six and twenty-four-hundredths (66.24) feet to the place of beginning.	N. 30 ft. of S. 60 ft. of W. 77.51 ft. east of and adjoining Chene St.	Frederick J. Schwankovsky..	Owner in fee.
		Julia St. V. Schwankovsky..	Contingent dower.
	S. 30 ft. of W. 84.53 ft. east of and adjoining Chene St.	Henry Ridiger.....	Owner in fee.
		Louisa Ridiger.....	Contingent dower.
	N. 30 ft. of S. 60 ft. of W. 77.51 ft. west of and adjoining Jos. Campau Ave. extended.	Charles Holtz.....	Owners in common.
		Horace Hitchcock.....	
		Susan A. Hitchcock.....	Contingent dower.
		Minnie Holtz.....	Contingent dower.
	S. 30 ft. of west 84.52 ft. west of and adjoining Jos. Campau Ave. extended.	Henry W. Whalen.....	Owner in fee.
		Charles P. Rabaut.....	Mortgagee.
	In line of Jos. Campau Ave. extended.	John Pfeifle.....	Owner in fee.
		Lena Pfeifle.....	Contingent dower.
	E. 101.20 ft. east of and adjoining Jos. Campau Ave. extended.	John Pfeifle.....	Owner in fee.
		Lena Pfeifle.....	Contingent dower.
		Michael Fischer.....	Occupant.
	East 20 ft. of east 121.20 ft. lying east of and adjoining Jos. Campau Ave. extended.	John Pfeifle.....	Owner in fee.
		Lena Pfeifle.....	Contingent dower.
	West 101.20 ft. lying west of and adjoining Mitchell Ave. extended.	Joseph E. Mason.....	Owner in fee.
		Lizzie Mason.....	Contingent dower.
		The City savings bank.....	Mortgagee.
	East 100 ft. lying east of and adjoining Mitchell Ave. extended.	Wilhelmina Berlin.....	Owner in fee.
	East 20 ft. of east 120 ft. lying east of and adjoining Mitchell Ave. extended and property included in lines of Mitchell Ave. extended.	John Pfeifle.....	Owner in fee.
		Lena Pfeifle.....	Contingent dower.
	West 100 ft. lying west of and adjoining McDougall Ave. extended.	Wilhelmina Berlin.....	Owner in fee.

13 Also all that part of outlot eleven (11) of the subdivision last mentioned, described as follows: Commencing at the intersection of the southerly line of said outlot with the easterly line of the Boulevard; thence north sixty-four (64) degrees east two hundred and five and forty-hundredths (205.40) feet; thence north twenty-six (26) degrees west seven and twenty-hundredths (7.20) feet; thence south sixty-four (64) degrees west nineteen (19) feet; thence north twenty-six (26) degrees west sixty and ten-hundredths (60.10) feet; thence south sixty-four (64) degrees west one hundred and eighty-six and forty-hundredths (186.40) feet; thence south twenty-six (26) degrees east sixty-six and ninety-hundredths (66.90) feet to the place of beginning.

Martin Lamb. Owner in fee.
Tillie B. Lamb. Contingent dower.

Also all that part of lot two (2) of the late Edwin Jerome's survey of part of fractional section twenty-eight (28), town one (1) south of range twelve (12) east, described as follows: Commencing at the intersection of the westerly line of said lot two (2) and the southerly line of Milwaukee avenue; thence south sixty-four (64) degrees west four hundred and forty-three and forty-hundredths (443.40) feet; thence south seventy-nine (79) degrees and four (4) minutes west two hundred and thirty and sixty-four-hundredths (230.64) feet; thence south sixty-four (64) degrees west two hundred and twenty-two and fourteen-hundredths (222.14) feet; thence south twenty-seven (27) degrees and forty-four (44) minutes east sixty and three-hundredths (60.03) feet to the place of beginning.

Michael Lambert. Owner in fee.
Christina Lambert. Contingent dower.

Also all the part of lot one (1) of the late Edwin Jerome's survey last mentioned described as follows: Commencing at the intersection of the southerly line of Milwaukee avenue extended and the westerly line of Mt. Elliott avenue; thence north twenty-seven (27) degrees and forty-two (42) minutes west sixty and three-hundredths (60.03) feet; thence south sixty-four (64) degrees west three hundred and eighty and three-hundredths (380.03) feet; thence north seventy-nine (79) degrees and four (4) minutes east two hundred and thirty and sixty-four-hundredths feet (230.64); thence north sixty-four (64) degrees east one hundred and fifty-nine (159) feet to the place of beginning.

Henry Lambert, Jr. Owner in fee.
Margaret Lambert. Contingent dower.

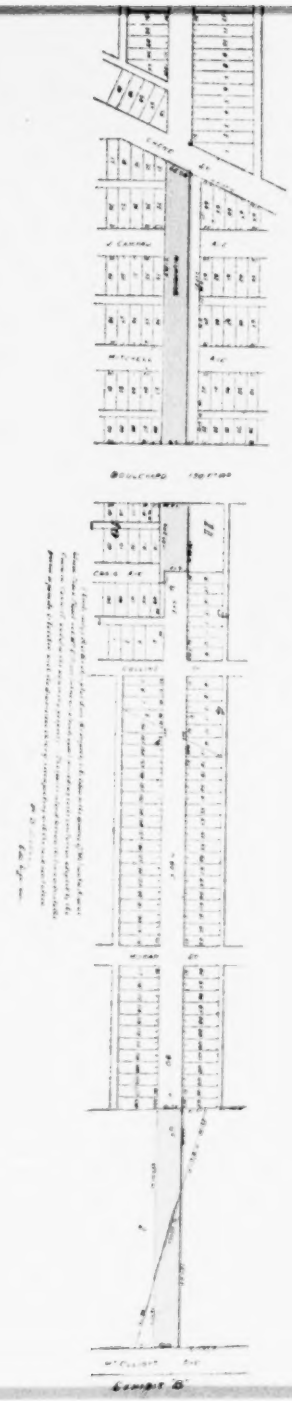
By Ald. SCOVEL:

Resolved, That the common council of the city of Detroit hereby declare it to be necessary to make a public improvement in the city of Detroit, by opening and extending Milwaukee avenue between Chene street and Mt. Elliott avenue where not already opened sixty feet wide (except between the Boulevard and Collins street where said avenue shall be an average width of 67.10 feet) for the use and benefit of the public as a public street and highway, and that they hereby declare that they deem it necessary to take the private property hereinafter described for such public improvement, to wit: Opening and extending Milwaukee avenue between Chene street and Mt. Elliott avenue where not already opened sixty feet wide (except between the Boulevard and Collins street, where said avenue shall be an average width of 67.10 feet) for the use and benefit of the public as a public street and highway, and that such improvement is for the use and benefit of the public; that the private property which they deem it necessary to take for the purpose of making such improvement is more particularly described as lying and being in the city of Detroit, county of Wayne and State of Michigan, and bounded as follows, to wit:

All that part of outlot eleven (11) of Theodore J. and Denis J. Campau plat of the subdivision of fractional section- No. twenty-nine (29) and thirty-two (32), town one (1) south, range 12 east, described as follows: Commencing at the southwesterly corner of said outlot eleven (11), thence north sixty-four (64) degrees east, seven hundred and eleven and eighty-five-hundredths (-11.85) feet; thence north twenty-six (26) degrees west, sixty (60) feet; thence south sixty-four (64) degrees west, six hundred and eighty-three and eighty-one-hundredths (683.81) feet; thence south fifty-seven (57) minutes east, sixty-six and twenty-four-hundredths (66.24) feet to the place of beginning.

Also all that part of outlot eleven (11) of the subdivision last mentioned, described as follows: Commencing at the intersection of the southerly line of said outlot with the easterly line of the Boulevard; thence north sixty-four (64) degrees east two hundred and five and forty-hundredths (205.40) feet; thence north twenty-six (26) degrees west, seven and twenty-hundredths (7.20) feet; thence south sixty-four (64) degrees west, nineteen (19) feet; thence north twenty-six (26) degrees west, sixty and ten-hundredths (60.10) feet; thence south sixty-four (64) degrees west, one hundred and eighty-six and forty-hundredths (186.40) feet; thence south twenty-six (26) degrees east, sixty-six and ninety-hundredths (66.90) feet to the place of beginning.

Also all that part of lot two (2) of the late Edwin Jerome's survey of part of fractional section twenty-eight (28), town one (1) south, range twelve (12) east, described as follows: Commencing at the intersection of the westerly line of said lot two (2) and the southerly line of Milwaukee avenue; thence south sixty-four (64) degrees west, four hundred and forty-three and forty-hundredths
15 (443.40) feet; thence south seventy-nine (79) degrees and four (4) minutes west, two hundred and thirty and sixty-four-



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&
Detroit
p 16

hundredths (230.64) feet; thence south sixty-four (64) degrees west, two hundred and twenty-two and fourteen-hundredths (222.14) feet; thence south twenty-seven (27) degrees and forty-four minutes (44) east, sixty and three-hundredths (60.03) feet to the place of beginning.

Also all that part of lot one (1) of the late Edwin Jerome's survey last mentioned, described as follows: Commencing at the intersection of the southerly line of Milwaukee avenue extended and the westerly line of Mt. Elliott avenue; thence north twenty-seven (27) degrees and forty-two (42) minutes west, sixty and three-hundredths (60.03) feet; thence south sixty-four (64) degrees west, three hundred and eighty and three-hundredths (380.03) feet; thence north seventy-nine (79) degrees and four (4) minutes east, two hundred and thirty and sixty-four-hundredths (230.64) feet; thence north sixty-four (64) degrees east, one hundred and fifty-nine (159) feet to the place of beginning.

2. And it is further resolved by the common council of the city of Detroit, that the city attorney be and is hereby directed to institute the necessary proceedings in behalf of the city of Detroit, in the recorder's court of the city of Detroit, to carry out the objects of this resolution.

Adopted as follows:

Yeas—Ald. Baker, Batchelder, Behlow, Bliel, Buhrer, Goeschel, Grunow, Hanes, Hoffman, Lowry, Patterson, Protivo, Richert, Robinson, Patterson, Roth, Schmidt, Scovel, Thompson, Vernor, Welsh, Wesch, Wright, Wuellner and the president.

Nays—None.

STATE OF MICHIGAN, } ss:
City of Detroit, }

CITY CLERK'S OFFICE, DETROIT.

I, John A. Schmid, deputy city clerk of the city of Detroit, in said State, do hereby certify that the foregoing and annexed paper is a true copy of a resolution adopted by the common council at a session held on the 14th day of November, 1893, and approved by the mayor November 21, 1893, as appears from the journal of said board remaining in the office of the city clerk of Detroit, aforesaid; that I have compared the same with the original in my office, and the same is a correct transcript therefrom, and of the whole of such original.

In witness whereof, I have hereunto set my hand and [SEAL.] affixed the corporate seal of said city at Detroit this 5th day of January, A. D. 1894.

JOHN A. SCHMID,
Deputy City Clerk.

(Here follows diagram marked p. 16.)

17 Sixth. That your petitioner has caused the said private property proposed to be taken to be surveyed, staked out and marked on the premises, and has caused a map or plan of said private property, so proposed to be taken, to be made and certified to be correct by the city engineer of the said city of Detroit, a copy of which map or plan is hereto attached, marked Exhibit "B" and made a part of this petition.

Wherefore, your petitioner prays that a jury may be summoned and empaneled to ascertain and determine whether it is necessary to make the said public improvement in the municipality; whether it is necessary to take the said private property, described in the fifth paragraph of this petition, for the use and benefit of the public; whether the taking of such private property is a necessity for the purpose of making such public improvement; to ascertain and determine the just compensation to be made for such private property proposed to be taken, and to whom the same shall be paid; and to perform such other duties as are provided to be performed by such juries by act number 124 of the Session Laws of the State of Michigan for 1883, as amended March 29, 1887, and July 3, 1889, being the act referred to in paragraph one of this petition.

Your petitioner further prays that, upon the filing hereof, a summons do issue to all the persons mentioned in paragraph five of this petition, as being interested in said private property proposed to be taken, commanding them, in the name of the people of the State of Michigan, to appear before said court at a time and place to be named in said summons, not less than twenty nor more than forty days from the date of the same, and show cause, if any they have, why the prayer of this petition should not be granted.

And your petitioner prays for such other and further relief as may be necessary within the objects of the act heretofore mentioned.

And your petitioner will ever pray.

THE CITY OF DETROIT,
By FRANK A. RASCH,
City Attorney.

STATE OF MICHIGAN, } ss :
County of Wayne, }

On this sixth day of January, A. D. 1894, before me, a notary public in and for said county, personally came Frank A. Rasch, and made oath that he is city attorney for the city of Detroit; that he has read the foregoing petition by him subscribed and knows the contents thereof, and that the same are true to the best of his knowledge and belief.

L. C. SHERWOOD,
Notary Public, Wayne County, Michigan.

Endorsed on back: "Filed this 6th day of January, A. D. 1894. George H. Lesher, clerk of the recorder's court."

18 EXHIBIT "2."

Report and Verdict of Jury.

STATE OF MICHIGAN:

In the Recorder's Court of the City of Detroit.

In the matter of opening and extending Milwaukee avenue between Chene street and Mt. Elliott avenue, where not already opened, sixty feet wide (except between the Boulevard and Collins street, where said avenue shall be an average width of 67.10 feet), for the use and benefit of the public as a public street and highway, in the city of Detroit.

Part I.

We, the undersigned jury, empaneled in the above matter, and having given the same due consideration, do hereby find and determine that it is necessary to make a public improvement in the municipality of Detroit, by opening and extending Milwaukee avenue between Chene street and Mt. Elliott avenue where not already opened sixty feet wide (except between the Boulevard and Collins street, where said avenue shall be an average width of 67.10 feet) for the use and benefit of the public as a public street and highway, as proposed, and that it is necessary to take the private property described in the petition in this cause, which said property is hereinafter also described, for the use and benefit of the public, and that it is necessary to take such private property for the purpose of making such public improvement.

Part II.

The private property that it is necessary to take, the damages sustained, and the just compensation to be made for such private property, and to whom payable, we hereby ascertain and determine as follows:

All that part of outlot eleven (11) of Theodore J. and Denis J. Campau plat of the subdivision of fractional section- No. twenty-nine (29) and thirty-two (32), town one (1) south, range 12 east, described as follows:

Commencing at the southwesterly corner of said outlot eleven (11) thence north sixty-four (64) degrees east, seven hundred and eleven and eighty-five-hundredths (711.85) feet, thence north twenty-six (26) degrees west sixty (60) feet; thence south sixty-four (64) degrees west six hundred and eighty-three and eighty-one-hundredths (683.81) feet; thence south fifty-seven (57) minutes east, sixty-six and twenty-four-hundredths (66.24) feet to the place of beginning.

19 Also all that part of outlot eleven (11) of the subdivision last mentioned, described as follows:

Commencing at the intersection of the southerly line of said outlot with the easterly line of the Boulevard; thence north sixty-four

(64) degrees east, two hundred and five and forty-hundredths (205.40) feet; thence north twenty-six (26) degrees west, seven and twenty-hundredths (7.20) feet; thence south sixty-four (64) degrees west, nineteen (19) feet; thence north twenty-six (26) degrees west, sixty and ten-hundredths (60.10) feet; thence south sixty-four (64) degrees west, one hundred and eighty-six and forty-hundredths (186.40) feet; thence south twenty-six (26) degrees east, sixty-six and ninety-hundredths (66.90) feet to the place of beginning.

Martin Lamb, owner in fee, $2,507.75—Martin Lamb.

Tillie B. Lamb, contingent dower, 1.00—Tillie B. Lamb.

Also all that part of lot two (2) of the late Edwin Jerome's survey of part of fractional section twenty-eight (28), town one (1) south, range twelve (12) east, described as follows:

Commencing at the intersection of the westerly line of said lot two (2) and the southerly line of Milwaukee avenue; thence south sixty-four (64) degrees west, four hundred and forty-three and forty-hundredths (443.40) feet; thence south seventy-nine (79) degrees and four (4) minutes west, two hundred and thirty and sixty-four-hundredths (230.64) feet; thence south sixty-four (64) degrees west, two hundred and twenty-two and fourteen-hundredths (222.14) feet; thence south twenty-seven (27) degrees and forty-four minutes (44) east, sixty and three-hundredths (60.03) feet to the place of beginning.

Michael Lambert, owner in fee, $1,379.00—Michael Lambert.

Christina Lambert, contingent dower, $1.00—Christina Lambert.

Also all that part of lot one (1) of the late Edwin Jerome's survey last mentioned, described as follows: Commencing at the intersection of the southerly line of Milwaukee avenue extended and the westerly line of Mt. Elliott avenue; thence north twenty-seven (27) degrees and forty-two (42) minutes west sixty and three-hundredths (60.03) feet; thence south sixty-four (64) degrees west three hundred and eighty and three-hundredths (380.03) feet; thence north seventy-nine (79) degrees and four (4) minutes east two hundred and thirty and sixty-four-hundredths (230.64) feet; thence north sixty-four (64) degrees east one hundred and fifty-nine (159) feet to the place of beginning.

20 Descriptions of each of the several parcels of private property proposed to be taken.	Owners or occupants and others interested in each parcel.	Compensation.	To whom payable.
N. 30 ft. of S. 60 ft. of W. 77.51 — east of and adjoining Chene St.	Frederick J. Schwankovsky.....owner in fee	827 00	Frederick J. Schwankovsky
	Julia St. V. Schwankovsky.....contingent dower	1 00	Julia St. V. Schwankovsky.
S. 30 ft. of W. 84.53 ft. east of and adjoining Chene St.	Henry Ridiger.....owner in fee	827 00	Henry Ridiger.
	Louisa Ridiger.....contingent dower	1 00	Louisa Ridiger.
No. 30 ft. of S. 60 ft. of W. 77.51 ft. west of and adjoining Jos. Campau Ave. extended.	Charles Holtz, Horace Hitchcock.....owners in common	538 00	Charles Holtz. Horace Hitchcock.
	Susan A. Hitchcock.....contingent dower	1 00	Susan A. Hitchcock.
	Minnie Holtz.....contingent dower	1 00	Minnie Holtz.
S. 30 ft. of W. 84.82 ft. west of and adjoining Jos. Campau Ave. extended.	Henry W. Whelan, Award payable first to mortgagee by stipulation.....owner in fee	218 00	Henry W. Whelan.
	Charles P. Rabaut, Award payable first to mortgagee by stipulation.....mortgagee	352 00	Charles P. Rabaut.
Between lines of Jos. Campau Ave. extended.	John Pfeifle*.....owner in fee		
	Lena Pfeifle.....contingent dower		
60 ft. of E. 101.20 ft. east of and adjoining Jos. Campau Ave. extended.	John Pfeifle,*.....owner in fee		
	Lena Pfeifle.....contingent dower		
20 ft. of east 121.20 ft. east of and adjoining Jos. Campau Ave. extended.	John Pfeifle*.....owner in fee		
	Lena Pfeifle.....contingent dower		
W. 101.20 ft. lying west of and adjoining Mitchell Ave. extended.	Joseph E. Mason.....owner in fee	479 00	Joseph E. Mason.
	Lizzie Mason.....contingent dower	1 00	Lizzie Mason.
	The City savings bank.....mortgagee	600 00	The City savings bank.
Between lines of Mitchell Ave. extended.	John Pfeifle*.....owner in fee		
	Lena Pfeifle.....contingent dower		
	Aggregate and lumped verdict award by stipulation.		
East 100 ft. lying east of and adjoining Mitchell Ave. extended.	Wilhelmina Berlin.....owner in fee	1,080 00	Wilhelmina Berlin.
E. 20 ft. of east 120 ft. lying east of and adjoining Mitchell Ave. extended.	John Pfeifle*.....owner in fee,* total for	2,099 00	* John Pfeifle.
	Lena Pfeifle.....contingent dower	1 00	* Lena Pfeifle.
West 100 ft. lying west of and adjoining McDougall Ave. extended.	Wilhelmina Berlin.....owner in fee	1,500 00	Wilhelmina Berlin.

21 Henry J. Lambert, owner in fee, $2,799.00—Henry J. Lambert.

Margaret Lambert, contingent dower, $1.00—Margaret Lambert. (It being stipulated that the city is not to take possession before October 1st, 1894.) $15,214.75

Part III.

And we, the said jury, further certify, that we do hereby award to each of the owners, occupants and other persons interested in said property the sum made payable to such owner, occupant or person in part two of this verdict, and that in each case we deem such sum to be a just compensation for the taking and using of said private property, and such sum is awarded for such purpose; and in cases where such private property was found to be subject to a valid mortgage, lease, agreement or other lien, estate or interest, we have apportioned and awarded to the parties in interest such portion of the damages and compensation (when we deemed it should be a portion and in other cases we have made an additional award to such person) as we deemed just and as appears in part two of this verdict.

All of which above matters are rendered to the court as the verdict of this jury, and as such is signed by each member of the jury.

1. James H. Kelly,
2. Charles F. Bielman,
3. Gerhard A. Schooff,
4. Joseph A. Walsh,
5. John Barry,
6. Simon A. Asther,
7. William Clifford,
8. G. C. Carter,
9. Fred Hartwig,
10. Wm. A. Chudleigh,
11. John B. Thompson,
12. H. C. Munett.

Endorsed on back: "Filed Mar. 8, 1894. Geo. H. Lesher clerk."

22 STATE OF MICHIGAN:

The Circuit Court for the County of Wayne. In Chancery.

JOHN C. GOODRICH and CLARENCE M. BURTON, Complainants,
vs.
THE CITY OF DETROIT and LOUIS B. LITTLEFIELD, City Treasurer, Defendants.

It is hereby stipulated, by and between the solicitors for the respective parties hereto, that the time for putting in the answers of the above-named defendants, The City of Detroit, and Louis B. Littlefield, city treasurer, may be and hereby is extended to the thirty-first day of December, 1897, and that either party may notice the above-entitled cause for hearing, and have the same placed upon the calendar for the next, or January term of said court, the same as though it were at issue at the date hereof.

Dated, Detroit, December 14th, A. D. 1897.

BACON & PALMER,
Solicitors for Complainants.
CHAS. FLOWERS,
Solicitor for Defendants.

23 In the Circuit Court for the County of Wayne In Chancery.

JOHN C. GOODRICH and CLARENCE M. BURTON
vs.
THE CITY OF DETROIT and LOUIS B. LITTLEFIELD, Treasurer.

The Answer of the said Defendants, The City of Detroit and Louis B. Littlefield, to the Complainants' Bill of Complaint.

First. These defendants admit the allegations contained in paragraphs 2, 3, 4, 5, 7, 8, 9, 10, 11, 12, 13 and 16 of said bill of complaint.

Second. They have no knowledge concerning the allegations contained in paragraphs 1, 14 and 15.

Third. They deny that said taxes are invalid as alleged in paragraph 17 of said bill of complaint; and they deny all the allegations of fact asserted inferentially as reason for claiming the taxes to be invalid, contained in subdivisions *a*, *b*, *c*, *d*, *e*, *f*, *g*, *h*, *i*, *j*, *k*, *l*, *m*, *n*, *o*, and *p*, in said paragraph 17; and as to the averments of law contained in said paragraph 17, they submit the same to the judgment of this court.

Fourth. These defendants deny that the complainants have stated a case which entitles them to relief, and they, therefore, pray the benefit of a demurrer, the same as though a demurrer had been specially interposed; and that the said bill of complaint may be dismissed with costs.

THE CITY OF DETROIT,
By CHARLES FLOWERS,
Corporation Counsel.
LOUIS B. LITTLEFIELD,
By CHARLES FLOWERS,
His Solicitor.

CHARLES FLOWERS,
Solicitor for Defendant,
1006 *Majestic Building, Detroit, Michigan.*

24 STATE OF MICHIGAN:

Circuit Court for the County of Wayne. In Chancery.

JOHN C. GOODRICH and CLARENCE M. BURTON
vs.
CITY OF DETROIT and LOUIS B. LITTLEFIELD, Treasurer.

The complainants say that notwithstanding the answer of the defendants, they are entitled to the relief prayed in their bill of complaint.

BACON & PALMER,
Solicitors for Complainants.

25 STATE OF MICHIGAN:

Circuit Court for the County of Wayne. In Chancery.

JOHN C. GOODRICH and CLARENCE M. BURTON
vs.
CITY OF DETROIT and LOUIS B. LITTLEFIELD, Treasurer.

SIR: You will please to take notice that the complainants intend to and do hereby claim the right to examination of all the witnesses in this cause in open court as in a suit at law.

Yours, &c., BACON & PALMER.

To Charles Flowers, solicitor for defendants.

Dated, January 10, 1898.

26 *Opinion.*

In the Circuit Court for the County of Wayne. In Chancery.

JOHN C. GOODRICH ET AL.
vs.
THE CITY OF DETROIT.

The bill in this case is filed to enjoin the collection of a special tax levied for the opening and extending of Milwaukee avenue between Chene street and Mt. Elliott avenue, sixty feet wide.

The proceedings were taken under the general act chapter 83, 3 Howell's Statutes as amended.

The complainants are not persons whose lands were taken by the proposed opening, and consequently they were not parties to the proceeding for the opening of said street; but they are owners of land within the assessment districts, authorized by section 3064 (*o*) Howell's Statutes, and therefore so far as the bill filed in this cause seeks to impugn the opening proceedings prior to the verdict and judgment, it is a collateral attack upon such proceedings.

Several grounds are urged why the assessment should be held void:

First. That the petition for opening the street and the verdict of the jury rendered in said cause do not describe the several parcels of land to be taken for such improvement.

The statute 3 Howell's Statutes, section 3064 (*c*) provides that the petition shall contain a description of the property to be taken
27 and generally the nature and extent of the use thereof that will be required and also the names of the owners and others interested in the property so far as can be ascertained.

The statute also requires the jury by their verdict to award to each of the owners and persons interested a just compensation for the property taken.

The cases cited in complainants' brief relate chiefly to the opening and laying out of drains or to proceedings for condemning land

for railway purposes. The requirements as to the description of the lands proposed to be taken in those cases are found in 1 Howell's Statutes, sections 1696 and 3382 and are essentially different from that above quoted. The statute in those cases requires substantially that each distinct parcel of land shall be described, whereas it will be seen that in the case of street-opening there is no such requirement. Moreover, the cases cited are those in which the question was raised by the land-owners in the direct action on appeal or by writ of error or certiorari, and not collaterally by other persons than the owners of the land as in this case. These authorities are not therefore in my opinion applicable to the case of street-openings, and to a collateral attack upon such proceedings.

In this case the petition in the first column describes with substantial accuracy all the land to be taken for the proposed opening. This is subject to one qualification. In one description of land in the first column in describing a course or direction there is a clerical error. Instead of the course running north 64° east as is correct, the description reads south 64° west. All the other descriptions containing the same course or direction read correctly, viz: N. 64° east. That this is a clerical error is proved by the fact that the original manuscript description on file reads correctly, to wit, north 64° east. Attached to the petition also is a carefully prepared plat of all the land proposed to be taken. This plat is made according to scale, and certified to by the city engineer and
28 shows the original lots and descriptions with dimensions, and the part proposed to be taken is in colors with dimensions of every parcel of land to be affected and is correct in every particular. This plat is referred to in the petition and made a part thereof. But in the second column of the petition wherein it was attempted to subdivide and apportion the general description contained in the first column among the several owners, there are some inaccuracies of description.

These several owners were all made parties defendant and appeared, and made no objection to such inaccuracies or errors of description of their property. They made no objection whatever to the jurisdiction or to proceeding in the case. They introduced testimony as to the value of their lands which would actually be taken as shown by the plat, and the jury awarded them severally such damages as they would suffer, as shown by the plat. The descriptions in the verdict are the same as in the petition. The verdict also refers to the plat in a finding that it is necessary to take the private property described in the petition in this cause. Judgment was duly entered confirming the verdict, and no appeal has been taken therefrom, and the time for appeal has expired. It was stated on the argument that all of the different persons whose lands were taken have received and accepted their awards as per the verdict, and have executed conveyance to the city of the lands actually taken.

The question before me is not whether some or any of those defendants, the owners of land taken might have enjoined the City of Detroit from proceeding to take possession of lands so inac-

curately described, for they have all submitted to the jurisdiction and the verdict, and received their awards. But the question is whether other persons, these complainants, whose lands were not taken, but which are within the assessment district made to pay for the said opening, can take advantage of such irregularities and inaccuracies to enjoin the collection of the said tax.

29 It is well established that a judgment can be attacked collaterally only for want of jurisdiction. Did the recorder's court therefore have jurisdiction of the proceeding to make the proposed opening notwithstanding such errors in description? The general description of the land to be taken was substantially correct. The plat must be regarded as a part of the petition, and together they correctly showed the land to be taken in detail with dimensions. Taken together the inaccuracies of description are corrected upon the very face of the papers. There is not even a claim that any one was misled thereby. Moreover, the statute (Howell's section 3064*j*) provides that amendments may be allowed in the description of property proposed to be taken as well after as before judgment confirming the verdict. This would seem to imply that errors in description of small parcels were not intended to defeat the jurisdiction, so long as the whole property to be taken was correctly stated; otherwise the provision for amending descriptions would be meaningless and useless.

I have no doubt, therefore, that the recorder's court did have jurisdiction of both the persons and subject-matter of the proceeding and that the City of Detroit got a good title to the lands shown in the plat. If any of the defendants whose lands were to be taken had objected to the descriptions, they would undoubtedly have been at once corrected under the above liberal provision for amendments, and since none of such defendants did object to the descriptions, they must be regarded as having waived all inaccuracies of description, and that the verdict and judgment cures all of such errors.

Second. The statute, 3 Howell's section 3064 (G) prescribes the oath which the jurors shall take in street-opening cases. The only record found in the proceedings of the oath taken by the jurors in this case is contained in the journal as follows: "Thereupon

30 the jury impanelled (here follow the names of the jury) are duly elected, tried and sworn in the manner prescribed by law, etc."

It is contended that the omission to show that the jury took the oath required by the statute is a fatal defect in the proceedings.

It is not doubted that where in special proceedings the statute requires a particular oath to be taken, it must be shown that the oath prescribed was actually administered. If the oath required was not administered the objection was undoubtedly open to any of the defendants in that case, the parties interested. But it is equally well settled that the verdict when rendered cures all defects and irregularities in the proceedings, not jurisdictional. In my opinion this objection is not open to these complainants who were not parties to that proceeding and cannot be taken advantage of in a collateral attack upon the verdict and judgment. All the cases cited in the complain-

ants' brief are those in which the objection was raised in a direct review of the proceedings, either in certiorari, error or appeal, and in my judgment they are not applicable to the case of a collateral attack on such proceedings.

Third. That none of the lots of the complainants specified in the bill of complaint fronted on the proposed opening, and that the assessment district cannot under the statute embrace any lots not on the proposed opening.

The assessment in this case was made under the provisions of 3 Howell's section 3064 (*o*), which provides that if the common council believe that a portion of the city in the vicinity of the proposed improvement will be benefited by such improvement, they may by an entry in their minutes determine that the whole or any just proportion of the compensation awarded by the jury shall be assessed upon the owners or occupants of real estate deemed to be thus benefited, and that they shall by resolution fix and determine the district or portion of the city benefited and specify the amount to be
31 assessed upon the owners thereof. This would seem to be conclusive that the council had authority to include within the assessment district lots not on the proposed opening.

The statute also provides that the assessment shall be made and the amount levied and collected in the same manner and by the same officers and proceedings as near as may be, as is provided in the charter of the municipality for assessing, levying and collecting the expense of public improvements when a street is graded. Complainants' counsel contends that this limits the assessment district to lots fronting on the proposed improvement under section 216 of the charter of the city of Detroit applicable to grading and paving streets; but in my opinion the above provision refers only to the manner or form of making the assessment and to the officers who shall make and collect the same, and not to the extent of territory which may be included in the assessment district. To hold otherwise would be to entirely ignore the earlier provisions of the statute permitting the council in its discretion to make a larger assessment district.

Fourth. It is further contended that the resolution of the common council fixing the assessment district did not specify that such district was benefited by such improvement to the extent of fifteen thousand two hundred fourteen and seventy-five one-hundredths dollars ($15,214.75), the amount to be assessed upon it, and an elaborate argument is made to show that such finding is the only constitutional or legal basis on which such tax can be imposed and the case of Detroit *vs.* Chapin, 112 Mich. 588 is cited. There is no doubt of the principle invoked, that the actual benefit received as determined by the proper authority is the only legal or constitutional basis upon which such an assessment can be sustained; and that such an assessment without such a determination is both illegal and unconstitutional. The only question here is whether the statute and the resolution of the council in compliance therewith are not in effect a finding or determination that the

assessment district is benefited to the extent of the assess-
32 ment. That resolution declared first that the property within the assessment district was benefited by the proposed opening. It then directed that there should be levied upon the several pieces or parcels of real estate included in the assessment district the amount of fifteen thousand two hundred fourteen and seventy-five-hundredths dollars ($15,214.75) in proportion as near as may be to the advantage which each lot or parcel is deemed to acquire by such improvement. And again, the board of assessors are directed in making the roll to assess and levy the amount of fifteen thousand two hundred fourteen and seventy-five one-hundredths dollars ($15,214.75) — each lot or parcel to be assessed a ratable proportion as near as may be of said amount in accordance to the amount of benefit derived by such improvement.

In my opinion this is a substantial compliance with the provisions of the statute.

The case of Chapin *vs.* Detroit was entirely different. In that case the law provided arbitrarily that in all cases one-half of the award should be assessed upon the assessment district fixed without any regard as to whether the property was benefited. In other words, neither the common council nor the jury were allowed to exercise any discretion relative to the benefits received but were required to assess fifty per cent. of the verdict regardless of benefits received. The court held that the legislature could not arbitrarily fix such a percentage.

Some other points are urged in the complainants' brief but they were not strongly insisted on in the argument and it is not necessary to discuss them.

In my opinion the injunction should be dissolved and the bill dismissed.

W. M. LILLIBRIDGE,
Circuit Judge.

33 STATE OF MICHIGAN:

In the Circuit Court for the County of Wayne. In Chancery.

JOHN C. GOODRICH and CLARENCE M. BURTON, Complainants,
vs.
THE CITY OF DETROIT and LOUIS B. LITTLEFIELD, Defendants.

At a session of said court, held at the court-house, in the city of Detroit, on the second day of December, A. D. 1899.

Present: Honorable Willard M. Lillibridge, circuit judge.

This cause having come on upon the motion of complainants for leave to amend their bill of complaint, and by consent of Charles Flowers, of counsel for the defendants, it is ordered that the bill of complaint filed in this cause be, and the same is hereby amended by inserting in paragraph 17 in said bill of complaint, immediately following subdivision *p*, the following:

(*q*.) Because section 3406 of the Compiled Laws of the State of Michigan of 1897, is in violation of article 6, section 32 of the

constitution of the State of Michigan, forbidding the depriving of any person of life, liberty or property without due process of law.

(*r.*) Because the resolution of the common council directing the assessment, and the assessment made in pursuance of said resolution, upon complainants' lands, by the common council of the city
34 of Detroit, was in violation of article 6, section 32 of the constitution of the State of Michigan.

(*s.*) Because section 3406 of the Compiled Laws of the State of Michigan of 1897, is in violation of the 14th amendment to the Constitution of the United States, forbidding any State from depriving a person of property, without due process of law.

(*t.*) Because the resolution of the common council directing the assessment and the assessment made in pursuance of said resolution, upon complainants' lands, for the opening of said street, was in violation of the 14th amendment to the Constitution of the United States, forbidding any State from depriving a person of property without due process of law.

(*u.*) Because section 3406 of the Compiled Laws of the State of Michigan of 1897, is in violation of article 6, section 32 of the constitution of the State of Michigan, because it does not require that the portion of the award of the jury which the common council may order to be assessed upon said assessment district shall not exceed the total amount of the benefits derived by the lands in said district from such improvement.

(*v.*) Because section 3406 of the Compiled Laws of the State of Michigan, of 1897, is in violation of the 14th amendment to the Constitution of the United States, because it does not require that the portion of the award of the jury which the common council may order to be assessed upon the said assessment district, shall not exceed the total amount of the benefits derived by the lands in said district from such improvement.

(*w.*) Because the resolution of the common council of the city of Detroit, directing said assessment, is in violation of article 6, section 32 of the constitution of the State of Michigan because it does not determine or find that the property included in the assessment district is benefited to the amount of the assessment.

35 (*x.*) Because the resolution of the common council of the city of Detroit, directing said assessment, is in violation of the 14th amendment to the Constitution of the United States, because it does not determine or find that the property included in the assessment district is benefited to the amount of the assessment.

WILLARD M. LILLIBRIDGE,
Circuit Judge.

36 *Decree.*

STATE OF MICHIGAN:

The Circuit Court for the County of Wayne. In Chancery.

JOHN C. GOODRICH and CLARENCE M. BURTON, Complainants,
vs.
THE CITY OF DETROIT and LOUIS B. LITTLEFIELD, Defendants.

At a session of said court, held at the court-house, in the city of Detroit, on the 2nd day of December, A. D. 1899.

Present: Honorable Willard M. Lillibridge, circuit judge.

This cause having come on to be heard upon the bill of complaint herein, the answer of defendant- thereto, the replication of the complainant- to such answer, and the proofs taken in open court in said cause, and having been argued by the counsel for the respective parties;

Now, therefore, on consideration thereof, it is ordered, adjudged and decreed, and the court doth hereby order, adjudge and decree, that the complainants' said bill of complaint be and the same is hereby dismissed, with costs to the defendants to be taxed.

WILLARD M. LILLIBRIDGE,
Circuit Judge.

37 *Case as Settled.*

STATE OF MICHIGAN:

Circuit Court for the County of Wayne. In Chancery.

JOHN C. GOODRICH and CLARENCE M. BURTON, Complainants,
vs.
THE CITY OF DETROIT and LOUIS B. LITTLEFIELD, Defendants.

This cause came on to be heard on bill of complaint, answer and replication thereto, and proofs taken in open court, before the Hon. Willard M. Lillibridge, circuit judge.

It was conceded that the complainants were the owners of lots numbers 66, 69, 70, 80, 81, 84, 85, 86, 87, 88, 89, 96, 97, 98, 99, 100, 101, 102, 103, 104 and 105, of Goodrich & Burton's subdivision of part of section 28, township 1 south of range 12 east, in the city of Detroit, Wayne county, Michigan, and that said lots are worth upwards of one hundred dollars.

Complainants offered in evidence all the records specified in paragraphs 2, 3, 4, 5, 7, 8, 9, 10, 11, 12, 13 and 14 of the bill of complaint, copies of which records are attached to the bill of complaint filed in this cause, and it is agreed that the copies attached to said bill of complaint shall be taken and used as evidence of such documents, the same as if they were set up in full and included in the testimony.

Complainants offered in evidence the record of the plat of Good-

rich & Burton's subdivision of section 28, town 1 south of range 12 east, which was duly executed and acknowledged by the owners, and dedicated to the public Milwaukee avenue and all the other streets and alleys platted thereon, a copy of which plat, so far as it shows the lots and streets and alleys, is hereto attached, marked Exhibit "C."

Complainants offered in evidence the assessment-roll, No. 58, for defraying the expense of opening and extending Milwaukee avenue, from which it appeared that the assessments on complainants' lots were the same as set forth in section 14 of the bill of complaint in this cause.

Complainants offered in evidence all the records and files of the recorder's court for the city of Detroit, in the proceedings taken for the opening and extending of Milwaukee avenue, from which it appeared that the petition for the opening of the said street, together with all the orders and proceedings had therein, are fully set forth in the bill of complaint as alleged therein.

38 Complainants offered in evidence the charter of the city of Detroit, so far as it relates to the grading and paving of streets.

Complainants offered in evidence from the proceedings of the common council, held April 26th, 1898, the following:

"To the honorable the common council.

GENTLEMEN: On Jan. 6, 1894, proceedings were instituted in the recorder's court for the opening of Milwaukee avenue, between Chene street and Mt. Elliott avenue; and afterwards, on Oct. 29, 1895 (a verdict having been obtained and the money for the awards having been paid into the city treasury), Milwaukee avenue was opened and worked as a public street under the direction of the board of public works.

The Dime savings bank of this city held a first mortgage upon two lots or strips of land taken in this street-opening proceeding, but through some inadvertence the bank was not made a respondent. The mortgage was given by Horace Hitchcock and Charles Holtz, Jan. 19, 1889, recorded in Liber 201 of Mortgages, at page 262, and covered a number of lots aside from those included in the street. All those lots lying outside the street, with one exception, have been released from the mortgage; and now the Dime savings bank is foreclosing upon this lot, known as lot No. 77, and the two lots in the street, known for convenience as lots No. 74 and 75, of E. D. Foster's subdivision of lot 11, fractional section 29 and 32, town 1 south range 12 east.

The amount now due under the mortgage, including costs, is about $650. The lot lying outside the street, as I am informed, is not worth to exceed $500, and there is now due on the same lot an assessment approximating $180, for the opening of Milwaukee avenue; so it is apparent that if the bank obtains a decree, the lots now used for street purposes will have to be sold to satisfy the mortgage.

In order to prevent the closing of Milwaukee avenue by such a

sale, I have secured an agreement in writing from Charles Holtz, one of the mortgagors and a defendant in the foreclosure proceedings, which agreement is attached to this communication. Mr. Holtz agrees to purchase at foreclosure sale lot 77 (lying outside the street) for an amount sufficient to satisfy the mortgage against all three lots, and release the three lots lying in Milwaukee avenue, provided the city will refund the amount of the assessment, including penalties and costs, now resting against lot 77, for the opening of Milwaukee avenue.

39 Under all the circumstances, this is a good settlement of the difficulty. If your honorable body decided to ratify the agreement with Mr. Holtz, it will be advisable to do so at once, as the foreclosure case will be on trial in the chancery court Thursday next, the 28th inst.

Respectfully submitted,

ARTHUR WEBSTER,
Assistant Corporation Counsel.

Accepted, and leave being granted, the following resolution was offered by Ald. Scovel:

Resolved, That the city controller be and he is hereby authorized and instructed to sign the agreement drawn up by the corporation counsel, between Charles Holtz and the City of Detroit, in the matter of refunding an assessment for the opening of Milwaukee avenue east.

Adopted as follows: Yeas 29, nays none."

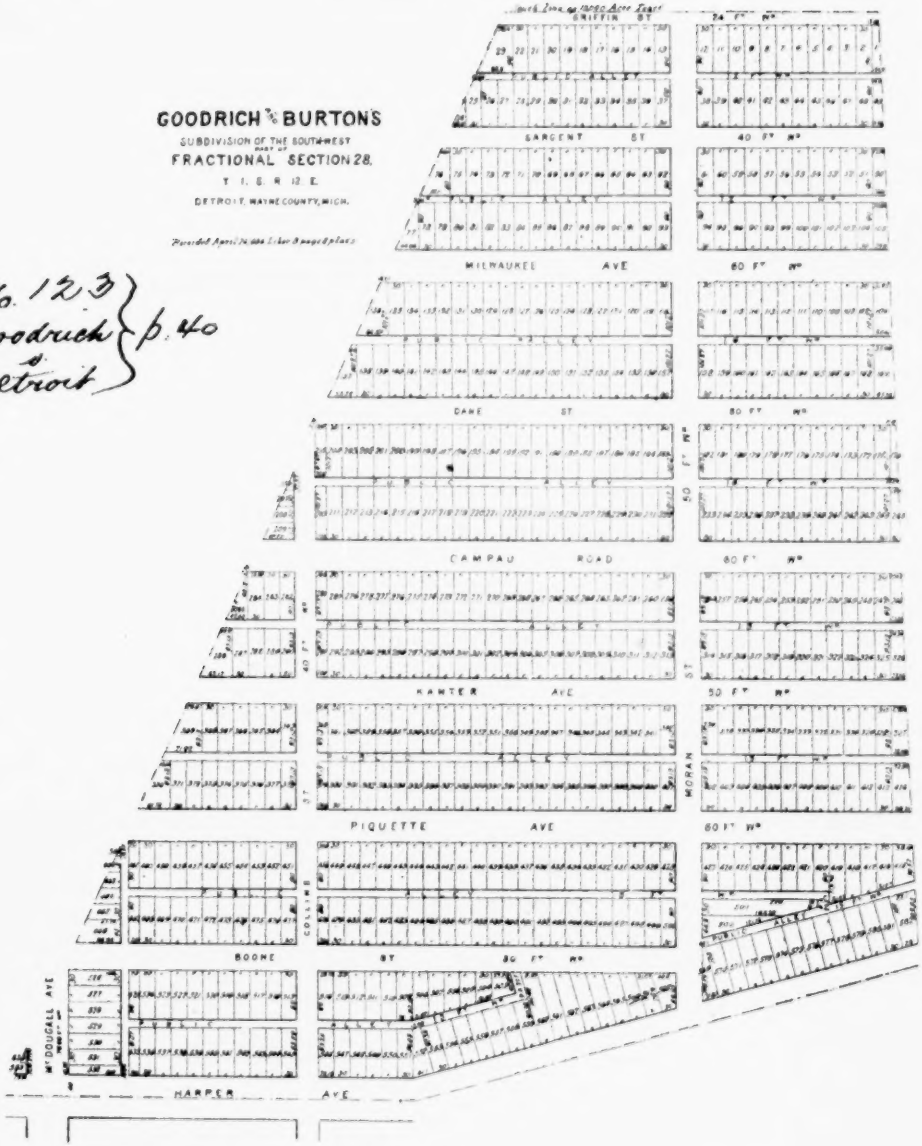
It was agreed between the counsel for the respective parties that either party might produce on the hearing in the supreme court, any of the original records referred to in the bill of complaint, answer or testimony in this cause, with the same effect as though such records had been printed in the evidence.

I hereby certify that the foregoing constitutes the substance of all the material testimony introduced on the trial of said cause, and is hereby settled and signed by me on the application of the complainants, this second day of December, A. D. 1899.

WILLARD M. LILLIBRIDGE,
Circuit Judge.

(Here follows diagram marked p. 40.)

EXHIBIT "3."



No. 123
Goodrich
& Detroit
p. 40

41 STATE OF MICHIGAN:

Circuit Court for the County of Wayne. In Chancery.

JOHN C. GOODRICH and CLARENCE M. BURTON, Complainants,
vs.
THE CITY OF DETROIT and LOUIS B. LITTLEFIELD, City Treasurer, Defendants.

Now come the said complainants and hereby claim the benefit of an appeal to the supreme court, from the final decree rendered in said cause by said court upon the 2nd day of December, A. D. 1899.

BACON & YERKES,
Solicitors for Complainants.

Dated, December 2, A. D. 1899.

42 At a session of the supreme court of the State of Michigan, held at the supreme court room, in the capitol, in the city of Lansing, on the sixth day of February in the year of our Lord one thousand nine hundred.

Present: The Honorable Robert M. Montgomery, chief justice. Frank A. Hooker, Joseph B. Moore, Charles D. Long, Claudius B. Grant, associate justices.

JOHN C. GOODRICH and CLARENCE M. BURTON, Complainants and Appellants,
vs.
THE CITY OF DETROIT ET AL., Defendants. No. 17897.

This cause coming on to be heard is duly submitted on briefs.

43 *Opinion.*

Supreme Court of the State of Michigan.

JOHN C. GOODRICH and CLARENCE M. BURTON
vs.
THE CITY OF DETROIT and LOUIS B. LITTLEFIELD.

The facts are sufficiently set out in the opinion of Judge Lillibridge, who heard the case in the court below. We adopt the opinion. It is as follows:

"The bill in this case is filed to enjoin the collection of a special tax levied for the opening and extending of Milwaukee avenue, between Chene street and Mt. Elliott avenue, sixty feet wide. The proceedings were taken under the general act, chapter 83, 3 Howell's Statutes, as amended. The complainants are not persons whose lands were taken by the proposed opening, and, consequently, they were not parties to the proceeding for the opening of said street; but they are owners of land within the assessment district authorized by section 3064 (*o*), Howell's Statutes; and therefore, so far as the bill filed in this cause seeks to impugn the opening proceedings

prior to the verdict and judgment, it is a collateral attack upon such proceedings. Several grounds are urged why the assessment should be held void:

"First. That the petition for opening the street and the verdict of the jury rendered in said cause do not describe the several parcels of land to be taken for such improvement.

"The statute, 3 Howell's Statute-, section 3064 (*o*) provides that the petition shall contain a description of the property to be taken and generally the nature and extent of the use thereof that will be required and also the names of the owners and others interested in the property, so far as can be ascertained. The statute also requires the jury by their verdict to award to each of the owners and persons interested a just compensation for the property taken.

"The cases cited in complainants' brief relate chiefly to the opening and laying out of drains or to proceedings for condemning land for railway purposes. The requirements as to the description of the lands proposed to be taken in those cases are found in 1 Howell's Statutes, sections 1696 and 3382, and are essentially different from that above quoted. The statute in those cases requires substantially that each distinct parcel of land shall be described, whereas it will be seen that in the case of street opening there is no such
44 requirement. Moreover, the cases cited are those in which the question was raised by the land-owners in the direct action on appeal or by writ of error or certiorari, and not collaterally by other persons than the owners of the land, as in this case. These authorities are not, therefore, in my opinion, applicable to the case of street openings and to a collateral attack upon such proceedings.

"In this case the petition in the first column describes with substantial accuracy all the land to be taken for the proposed opening. This is subject to one qualification. In one description of land in the first column, in describing a course or direction there is a clerical error. Instead of the course running 'north 64 east,' as is correct, the description reads 'south 64 west.' All the other descriptions containing the same course or direction read correctly, viz., 'N. 64 east.' That this is a clerical error is proved by the fact that the original manuscript description on file reads correctly, to wit, 'north 64 east.' Attached to the petition also is a carefully prepared plat of all the land proposed to be taken. This plat is made according to scale and certified to by the city engineer, and shows the original lots and descriptions with dimensions, and the part proposed to be taken is in colors with dimensions of every parcel of land to be affected and is correct in every particular. This plat is referred to in the petition and made a part thereof; but in the second column of the petition wherein it was attempted to subdivide and apportion the general description contained in the first column among the several owners, there are some inaccuracies of description. These several owners were all made parties defendant, and appeared and made no objections to such inaccuracies or errors of description of their property. They made no objection whatever to the jurisdiction or to proceeding in the case. They introduced

testimony as to the value of their lands which would actually be taken as shown by the plat, and the jury awarded them severally such damages as they would suffer, as shown by the plat. The descriptions in the verdict are the same as in the petition. The verdict also refers to the plat in a finding that it is necessary to take the private property described in the petition in this cause. Judgment was duly entered confirming the verdict, and no appeal has been taken therefrom and the time for appeal has expired. It was stated on the argument that all of the different persons whose lands were taken have received and accepted their awards as per the verdict and have executed conveyance to the city of the lands actually taken.

"The question before me is not whether some or any of those defendants, the owners of land taken, might have enjoined the city of Detroit from proceeding to take possession of lands so inaccurately described, for they have all submitted to the jurisdiction and the verdict and received their awards; but the question is whether other persons, these complainants, whose lands were not taken but which are within the assessment district, made to pay for the said opening, can take advantage of such irregularities and inaccuracies to enjoin the collection of the said tax.

"It is well established that a judgment can be attacked collaterally only for want of jurisdiction. Did the recorder's court, therefore, have jurisdiction of the proceeding to make the proposed opening, notwithstanding such errors in description? The general description of the land to be taken was substantially correct. The plat must be regarded as a part of the petition, and together they correctly showed the land to be taken in detail with dimensions. Taken together, the inaccuracies of description are corrected upon the very face of the papers. There is not even a claim that any one was misled thereby. Moreover, the statute (Howell's, section 3064), provides that amendments may be allowed in the description of property proposed to be taken as well after as before judgment confirming the verdict. This would seem to imply that errors in description of small parcels were not intended to defeat the jurisdiction, so long as the whole property to be taken was correctly stated; otherwise the provision for amending descriptions would be meaningless and useless. I have no doubt, therefore, that the recorder's court did have jurisdiction of both the persons and the subject-matter of the proceeding and that the city of Detroit got a good title to the lands shown in the plat. If any of the defendants whose lands were to be taken had objected to the descriptions they would undoubtedly have been at once corrected under the above liberal provision for amendments; and since none of such defendants did object to the descriptions, they must be regarded as having waived all inaccuracies of description, and that the verdict and judgment cure all of such errors.

"Second. The statute, 3 Howell's, section 3064 (*g*), prescribes the oath which the jurors shall take in street-opening cases. The only record found in the proceedings of the oath taken by the jurors in this case is contained in the journal as follows: Thereupon the jury

impannelled (here follow the names of the jury) are duly elected, tried and sworn in the manner prescribed by law, etc. It is contended that the omission to show that the jury took the oath required by the statute is a fatal defect in the proceedings.

"It is not doubted that where in special proceedings the statute requires a particular oath to be taken, it must be shown that the oath prescribed was actually administered. If the oath required was not administered, the objection was undoubtedly open to any of the defendants in that case, the parties interested; but it is equally well settled that the verdict when rendered cures all defects and irregularities in the proceedings not jurisdictional. In my opinion, this objection is not open to these complainants who were not parties to that proceeding and cannot take advantage of it in a collateral attack upon the verdict and judgment. All the cases cited in the complainants' brief are those in which the objection was raised in a direct review of the proceedings, either in certiorari, error or appeal, and in my judgment they are not applicable to the case of a collateral attack on such proceedings.

46 "Third. That none of the lots of complainants specified in the bill of complaint fronted on the proposed opening, and that the assessment district cannot under the statute embrace any lots not on the proposed opening.

"The assessment in this case was made under the provisions of 3 Howell's, section 3064 (*o*), which provides that if the common council believe that a portion of the city in the vicinity of the proposed improvement will be benefitted by such improvement, they may by an entry in their minutes determine that the whole or any just proportion of the compensation awarded by the jury shall be assessed upon the owners or occupants of real estate deemed to be thus benefitted, and that they shall by resolution fix and determine the district or portion of the city benefitted and specify the amount to be assessed upon the owners thereof. This would seem to be conclusive that the council had authority to include within the assessment district lots not on the proposed opening.

"The statute also provides that the assessment shall be made and the amount levied and collected in the same manner and by the same officers and proceedings as near as may be as is provided in the charter of the municipality for assessing, levying and collecting the expense of public improvements when a street is graded. Complainants' counsel contends that this limits the assessment district to lots fronting on the proposed improvement under section 216 of the charter of the city of Detroit applicable to grading and paving streets; but in my opinion, the above provision refers only to the manner and form of making the assessment and to the officers who shall make and collect the same, and not to the extent of territory which may be included in the assessment district. To hold otherwise would be to entirely ignore the earlier provisions of the statute permitting the council in its discretion to make a larger assessment district.

"Fourth. It is further contended that the resolution of the common council fixing the assessment district did not specify that such

district was benefitted by such improvement to the extent of fifteen thousand two hundred fourteen and seventy-five-hundredths dollars ($15,214.75), the amount to be assessed upon it, and an elaborate argument is made to show that such finding is the only constitutional or legal basis on which such a tax can be imposed; and the case of Detroit *vs.* Chapin, 112 Michigan, 588, is cited.

"There is no doubt of the principle invoked, that the actual benefit received as determined by the proper authority is the only legal or constitutional basis upon which such an assessment can be sustained, and that such an assessment without such a determination is both illegal and unconstitutional. The only question here is whether the statute and the resolution of the council in compliance therewith are not in effect a finding or determination that the assessment district is benefitted to the extent of the assessment. That resolution declared first that the property within the assessment district is benefitted by the proposed opening. It then directed
47 that there should be levied upon the several pieces or parcels of real estate included in the assessment district the amount of fifteen thousand two hundred fourteen and seventy-five-hundredths dollars ($15,214.75) in proportion as near as may be to the advantage which each lot or parcel is deemed to acquire by such improvement. And again, the board of assessors is directed in making the roll to assess and levy the amount of fifteen thousand two hundred fourteen and seventy-five-hundredths dollars ($15,214.75), each lot or parcel to be assessed a ratable proportion as near as may be of said amount in accordance to the amount of benefit derived by such improvement. In my opinion this is a substantial compliance with the provisions of the statute.

"The case of Chapin *vs.* Detroit was entirely different. In that case the law provided arbitrarily that in all cases one-half of the award should be assessed upon the assessment district fixed without any regard as to whether the property was benefitted. In other words, neither the common council nor the jury were allowed to exercise any discretion relative to the benefits received but were required to assess fifty per cent. of the verdict regardless of benefits received. The court held that the legislature could not arbitrarily fix such percentage.

"Some other points are urged in the complainants' brief; but they were not strongly insisted on in the argument, and it is not necessary to discuss them.

"In my opinion the injunction should be dissolved and the bill dismissed."

A decree was entered in accordance with the above opinion.

We think the opinion fully sustained by the authorities. In the case of Scotten *vs.* City of Detroit, 106 Mich., 564, it was held that the statute contemplates a judicial determination of the questions raised by the averments of the petition; that a judgment of confirmation necessarily includes a determination by the court that the proceedings were properly instituted; that such judgment is not open to collateral attack; and that therefore a judgment having been properly entered a tax-payer cannot maintain a bill to restrain

the collection of an assessment for benefits derived from the improvement, on the ground that the resolution of the council was not legally adopted. See also: Smith *vs.* City of Detroit, 6 Det. Legal News, 281.

The question of the constitutionality of the act is fully discussed and disposed of in the case of Voigt *vs.* City of Detroit, filed at the present term.

The other questions raised have been so fully discussed by the learned circuit judge that nothing further need be added.

The decree below must be affirmed with costs.

CHARLES D. LONG.
C. B. GRANT.
J. B. MOORE.
R. M. MONTGOMERY.
FRANK A. HOOKER.

(Endorsed:) Filed March 27, 1900. Chas. C. Hopkins, clerk supreme court.

48 At a session of the supreme court of the State of Michigan, held at the supreme court room, in the capitol, in the city of Lansing, on the twenty-seventh day of March in the year of our Lord one thousand nine hundred.

Present: The Honorable Robert M. Montgomery, chief justice; Frank A. Hooker, Joseph B. Moore, Charles D. Long, Claudius B. Grant, associate justices.

JOHN C. GOODRICH and CLARENCE M. BURTON, Complainants and Appellants,
vs.
THE CITY OF DETROIT and LOUIS B. LITTLEFIELD, City Treasurer, Defendants.
No. 17897.

This cause having been brought to this court by appeal from the circuit court for the county of Wayne, in chancery, and having been argued by counsel, and due deliberation had thereon, it is now ordered, adjudged and decreed by the court, that the decree of the circuit court for the county of Wayne, in chancery, dismissing the bill of complaint be and the same is hereby in all things affirmed. And it is further ordered, adjudged and decreed that the defendants do recover of and from the complainants costs, to be taxed.

49 To the Hon. Henry B. Brown, justice of the Supreme Court of the United States:

The petition of John C. Goodrich and Clarence M. Burton, respectfully shows:

1. That they are the complainants and appellants in a suit in equity commenced in the circuit court for the county of Wayne, in the State of Michigan, against The City of Detroit and Louis B. Littlefield, treasurer of said city of Detroit, defendants, in which cause a final decree was rendered in the said circuit court for the county of Wayne, in chancery, in favor of the defendants, and which was

afterwards appealed to the supreme court of the State of Michigan, by your petitioners.

2. That said cause was heard on appeal in the supreme court of the State of Michigan, and a decree rendered therein affirming the decree and determination of the circuit court for the county of Wayne, in chancery, and dismissing your petitioner's bill of complaint.

3. That it was claimed by your petitioners, the complainants in said suit, that the assessment of certain special assessments upon and against certain land owned by your petitioners, was invalid, because a certain statute of the State of Michigan was unconstitutional and invalid for the reason that it is repugnant to the Constitution of the United States; that said claim was set up in the bill of complaint in said cause, and that the decision thereof by the supreme court of the State of Michigan was in favor of the validity of said statute.

4. That it was claimed by your petitioners, the complainants in said suit, that the assessment of certain special assessments upon and against certain lands owned by your petitioners, was in-
50 valid because certain proceedings which were taken under authority of the State of Michigan were unconstitutional and invalid for the reason that they were repugnant to the Constitution of the United States; that said claim was set up in the bill of complaint in said cause, and that the decision thereof by the supreme court of the State of Michigan was in favor of the validity of the said proceedings.

5. Whereupon your petitioners pray for an order allowing the issue of the writ of error herewith filed to remove the record in said cause to the Supreme Court of the United States for review, and for a citation directed to the defendants in said cause, and that the bond herewith tendered may be duly approved

JOHN C. GOODRICH,
CLARENCE M. BURTON,
Petitioners.

50½ [Endorsed:] Filed July 25, 1900 Chas. C. Hopkins clerk supreme court of Michigan.

51 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the State of Michigan, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the State of Michigan before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between John C. Goodrich and Clarence M. Burton, complainants and plaintiffs in error, and The City of Detroit and Louis B. Littlefield, treasurer of the city of Detroit, defendants and defendants in error, wherein was drawn in question the validity of a statute of said State of Michigan, on the ground of *their* being

repugnant to the Constitution of the United States, and the decision was in favor of such *their* validity; and wherein was drawn in question the validity of an authority exercised under said State on the ground of *their* being repugnant to the Constitution of the United States, and the decision was in favor of said *their* validity, a manifest error hath happened, to the great damage of the said John C. Goodrich and Clarence M. Burton, plaintiffs in error as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the twenty-third day of July, in the year of our Lord one thousand nine hundred.

[Seal of the Circuit Court, Eastern District of Michigan.]

WALTER S. HARSHA,
Clerk of the Circuit Court of the United States
for the Eastern District of Michigan.

Allowed by
H. B. BROWN,
Associate Justice of the Supreme Court
of the United States.

[Endorsed:] Filed July 25, 1900 Chas. C. Hopkins clerk supreme court of Michigan.

52 *Bond.*

Know all men by these presents, that we, John C. Goodrich and Clarence M. Burton, as principals, and James S. Goodrich as surety, are held and firmly bound unto the City of Detroit, in the State of Michigan, and Louis B. Littlefield, treasurer of the said city of Detroit in the full and just sum of one thousand dollars, to be paid to the said City of Detroit and Louis B. Littlefield, treasurer of the city of Detroit, certain attorney, executors, administrators, or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this twenty-third day of July in the year of our Lord one thousand nine hundred.

Whereas, lately at a session of the supreme court of the State of Michigan in a suit depending in said court, between John C. Goodrich and Clarence M. Burton complainants, and The City of Detroit

and Louis B. Littlefield, treasurer of the city of Detroit defendants, a decree was rendered against the said John C. Goodrich and Clarence M. Burton, complainants therein, and the said John C. Goodrich and Clarence M. Burton having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the decree in the aforesaid suit, and a citation directed to the said City of Detroit and Louis B. Littlefield, treasurer of the city of Detroit citing and admonishing them to be and appear at a supreme court of the United States, at Washington, within thirty days from the date thereof.

Now the condition of the above obligation is such, that if the said John C. Goodrich and Clarence M. Burton shall prosecute said writ to effect, and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

JOHN C. GOODRICH. [SEAL.]
CLARENCE M. BURTON. [SEAL.]
JAMES S. GOODRICH. [SEAL.]

Sealed and delivered in presence of—

—— ——.

Approved by
H. B. BROWN,
Associate Justice of the Supreme Court of the United States.

53 STATE OF MICHIGAN, } ss:
County of Wayne, }

James S. Goodrich of the city of Detroit in said county of Wayne being duly sworn deposes and says that he is worth the sum of one thousand dollars over and above all exemptions and liabilities and further saith not.

JAMES S. GOODRICH.

Sworn to and subscribed before me this ninth day of June, A. D. 1900.

H. H. RADCLIFFE,
Notary Public, Wayne County, Mich.

[Endorsed:] Copy. Goodrich *vs.* City of Detroit. Bond. Filed July 25, 1900. Chas. C. Hopkins, clerk.

54 UNITED STATES OF AMERICA, ss:

To the City of Detroit and Louis B. Littlefield, treasurer of the city of Detroit, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the clerk's office of the supreme court of the State of Michigan wherein John C. Goodrich and Clarence M. Burton are plaintiffs in error and you are

defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Henry B. Brown, associate justice of the Supreme Court of the United States, this twenty-third day of July, in the year of our Lord one thousand nine hundred.

HENRY B. BROWN,
Associate Justice of the Supreme Court of the United States.

On this 23rd day of July, in the year of our Lord one thousand nine hundred, personally appeared Elbridge F. Bacon before me, the subscriber, a notary public in and for the county of Wayne and State of Michigan and makes oath that he delivered a true copy of the within citation to William B. Thompson treasurer of the city of Detroit and also that he delivered a true copy to Francis A. Blades comptroller of the city of Detroit.

ELBRIDGE F. BACON.

Sworn to and subscribed the 23rd day of July, A. D. 1900.
HOWARD SHEPHERD,
Notary Public, Wayne County, Mich.

[Endorsed:] Filed July 25, 1900 Chas. C. Hopkins clerk supreme court of Michigan.

55 Supreme Court of the United States.

JOHN C. GOODRICH and CLARENCE M. BURTON, Plaintiffs in Error,
vs.
THE CITY OF DETROIT and LOUIS B. LITTLEFIELD, Treasurer of said City of Detroit, Defendants in Error.

Assignments of Error.

Now come the said John C. Goodrich and Clarence M. Burton, complainants and plaintiffs in error, by Harlow P. Davock, their solicitor, and say that in the record and proceedings aforesaid and in the judgment and decree of the supreme court of the State of Michigan in the said cause, there is manifest error, as follows, to wit:

1. That the said court erred in affirming the decree of the circuit court for the county of Wayne, in chancery, and dismissing the complainants' bill of complaint, because in and by said bill of complaint and in said suit there was drawn in question the validity of the statute of the State of Michigan, being section 3406 of the Compiled Laws of the State of Michigan of the year 1897 on the ground of its being repugnant to the fourteenth article of the amendments to the Constitution of the United States, in that it provides for the taking of property without due process of law, and because the said judg-

ment and decree of said supreme court of the State of Michigan was a decision in favor of said statute.

56 2. That the said court erred in affirming the decree of the circuit court for the county of Wayne, in chancery, and dismissing the complainants' bill of complaint, because in and by said bill of complaint and in said suit was drawn in question the validity of said statute of the State of Michigan, being section 3406 of the Compiled Laws of the State of Michigan for the year 1897, on the ground of its being repugnant to the fourteenth article of the amendments to the Constitution of the United States, in that it denies the equal protection of the laws to the owners of property assessed under the provisions of said statute, and so denied the equal protection of the law to the complainants, and because the said judgment and decree of the said supreme court of the State of Michigan was a decision in favor of the validity of said statute.

3. Said court erred in affirming the decree of the circuit court for the county of Wayne, in chancery, and dismissing the complainants' bill of complaint, because in and by said bill of complaint and in said suit was drawn in question the validity of the proceedings taken which resulted in the assessment upon the lands of the complainants, as set forth in the bill of complaint, which proceedings were an exercise of authority under the State of Michigan, upon the ground that the said proceedings were repugnant to the fourteenth article of the amendments to the Constitution of the United States, for the reason that they amounted to the taking of property without due process of law, and to a denial of the equal protection of the laws to the complainants, and because said judgment and decree of the said supreme court of the State of Michigan, was a decision in favor of the validity of said proceedings.

57 Whereas, by the law of the land the said judgment and decree of the said supreme court should have been given for the said John C. Goodrich and Clarence M. Burton, complainants, against the said City of Detroit and Louis B. Littlefield, treasurer of said city of Detroit, defendants, and should have reversed the decree of the circuit court for the county of Wayne, in chancery, and the said John C. Goodrich and Clarence M. Burton pray that the said judgment and decree may be reversed and annulled, and that a decree may be entered establishing and declaring the invalidity of said statute and proceedings.

HARLOW P. DAVOCK,
Solicitor for Complainants.

57½ [Endorsed:] Supreme Court of the United States. John C. Goodrich and Clarence M. Burton, plaintiffs in error, *vs.* The City of Detroit and Louis B. Littlefield, treasurer of said city of Detroit, defendants in error. Assignments of error. Filed July 27, 1900 Chas. C. Hopkins clerk supreme court of Michigan. Harlow P. Davock sol'r for compl'ts.

58 *Calendar Entries.*

Parties.	Plaintiffs' attorneys.	Defendants' attorneys.
John C. Goodrich and Clarence M. Burton, Complainants and Appellants, *vs.* The City of Detroit and Louis B. Littlefield, City Treasurer, Defendants.	Bacon & Yerkes. Appeal from Wayne, in chancery.	Charles Flowers.

Journal.	Date.	Proceedings.
	1899.	
	Dec. 2	Notice of appeal filed and proof of service filed.
	" 13	Record on appeal filed.
	" 13	Note of argument filed.
	1900.	
	Feb. 6	Stipulation as to briefs filed.
P, 641....	" 6	Submitted on briefs.
Q, 30 ..	Mar. 27	Affirmed with costs.
	July 2	Defendants' costs taxed at $33.76.
	" 25	Petition for allowance of writ filed.
	" 25	Writ of error to Supreme Court of the United States allowed by Brown, associate justice Supreme Court of United States.
	" 25	Citation with proof of service filed.
	" 25	Bond, duly approved, filed.
	" 27	Assignment of errors in Sup. Ct. U. S. filed.
	" 27	Return made to Supreme Court of United States.

59 Supreme Court of the State of Michigan.

JOHN C. GOODRICH and CLARENCE M. BURTON, Plaintiffs in Error,
vs.
THE CITY OF DETROIT and LOUIS B. LITTLEFIELD, Treasurer of said City, Defendants in Error.

STATE OF MICHIGAN, *In Supreme Court,* } ss:

I, Charles C. Hopkins, clerk of the supreme court of the State of Michigan, do hereby certify that the annexed and foregoing is a true and correct copy of the record and of all proceedings had and entered in the above-entitled cause by said court, including the written decision and reasons therefor, signed by the judges of said court; and filed in my office, as appears of record and in file in said cause; that I have compared the same with the originals and it is a true transcript therefrom, and the whole thereof; that attached thereto are the writ of error, with allowance endorsed thereon, a copy of the bond to the adverse parties, duly approved, filed with the writ of error, the citation with proof of service endorsed thereon,

and the assignments of error in the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said supreme court, at the city of Lansing this twenty-seventh day of July, in the year of our Lord one thousand nine hundred.

[Seal of the Supreme Court of Michigan, Lansing.]

CHAS. C. HOPKINS,
Clerk Supreme Court of the State of Michigan.

Endorsed on cover: File No. 17,853. Michigan supreme court. Term No. 123. John C. Goodrich and Clarence M. Burton, plaintiffs in error, *vs.* The City of Detroit and Louis B. Littlefield, treasurer of the city of Detroit. Filed July 31st, 1900.

No. 123.

NOV 25 1901
JAMES H. McKENNEY,
Clerk.

Br. of Bacon for P. C.

Filed Nov. 25, 1901.

SUPREME COURT OF THE UNITED STATES.

October Term, 1901.

No. 123.

JOHN C. GOODRICH AND CLARENCE M. BURTON, PLAINTIFFS IN ERROR,

vs.

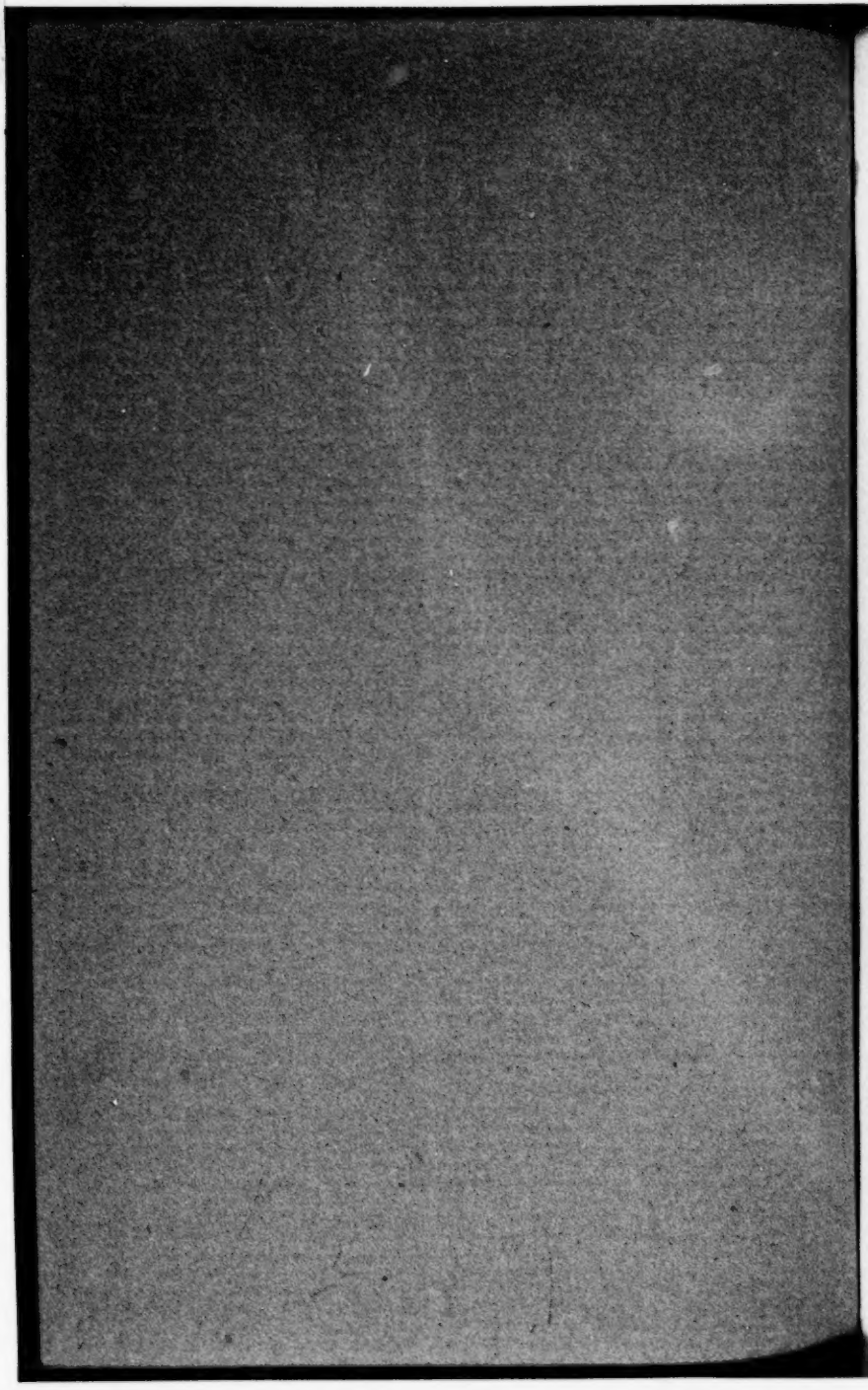
THE CITY OF DETROIT AND LOUIS B. LITTLEFIELD, TREASURER OF THE CITY OF DETROIT.

Error to the Supreme Court of the State of Michigan.

BRIEF OF ELBRIDGE F. BACON, COUNSEL FOR PLAINTIFFS IN ERROR.

ELBRIDGE F. BACON,
Counsel for Plaintiffs in Error.

DETROIT:
Record Printing Co., Free Press Bldg., 11 and 13 Lafayette Ave.
1901.



(17,853.)

SUPREME COURT OF THE UNITED STATES.

October Term, 1901.

No. 123.

JOHN C. GOODRICH AND CLARENCE M. BURTON, PLAINTIFFS IN ERROR,

vs.

THE CITY OF DETROIT AND LOUIS B. LITTLEFIELD, TREASURER OF THE CITY OF DETROIT.

Error to the Supreme Court of the State of Michigan.

BRIEF OF ELBRIDGE F. BACON, COUNSEL FOR PLAINTIFFS IN ERROR.

This is a writ of error to the Supreme Court of the State of Michigan, to review its decision sustaining special assessments against the lands of John C. Goodrich and Clarence M. Burton, in the City of Detroit, for the expense of opening Milwaukee avenue. The assessment was attacked by complainants on the ground that the act under which such proceedings were had, and the proceedings taken thereunder, deprived the complainants of property without due process of law, and were in violation of the Fourteenth Amendment to the Constitution of the United States.

Goodrich et al. vs. City of Detroit, 123 Mich., 559.

The proceedings to open this street were under the Statute of the State of Michigan authorizing the cities and

villages to take private property for the use or benefit of the public.

1 Mich. Comp Laws, 1897, Secs. 3392-3435.

The act, so far as it is material to the questions raised in this case, after providing for a preliminary resolution by the Common Council, is as follows:

"Sec. 3394. The city, village or county clerk shall make and deliver to such attorney, as soon as may be, a copy of such resolution certified under seal, and it shall be the duty of such attorney to prepare and file in the name of the city, village or county, in the court having jurisdiction of the proceedings, a petition signed by him in his official character and duly verified by him; to which petition a certified copy of the resolution of the common council, board of trustees or board of supervisors, shall be annexed, which certified copy shall be prima facie evidence of the action taken by the common council, board of trustees or board of supervisors, and of the passage of said resolutions. The petition shall state, among other things, that it is made and filed as commencement of judicial proceedings by the municipality or county in pursuance of this act to acquire the right to take private property for the use or benefit of the public, without consent of the owners, for a public improvement, designating it, for a just compensation to be made. *A description of the property to be taken shall be given*, and generally the nature and extent of the use thereof, that will be required in making and maintaining the improvement shall be stated, and *also the names of the owners and others interested in the property, so far as can be ascertained, including those in possession of the premises.* The petition shall also state that the common council or board of trustees or board of supervisors has declared such public improvement to be necessary, and that they deem it necessary to take the private property described in that behalf for such improvement for the use or benefit of the public. *The petition shall ask that a jury be summoned and empaneled to ascertain and determine whether it is necessary to make such public improvement, whether it is necessary to take such private property as it is proposed to take, for the use or benefit of the public, and to ascertain and determine the just compensation to be made therefor.* The petition may state any other pertinent matter or things and may pray for any other or further relief to which the municipality or county may be entitled within the objects of this act.

"Sec. 3395: *Upon receiving such petition, it shall be the duty of the clerk of said court to issue a summons against the respondents named in such petition,* stating briefly the object of said petition, and commanding them, in the name of the People of the State of Michigan, to appear before said court, at a time and place to be named in said summons, not less than twenty nor more than forty days from the date of the same, *and show cause if any they have, why the prayer of said petition should not be granted.*

"Sec. 3399: *The jury shall determine in their verdict the necessity for the proposed improvement and for taking such private property for the use or benefit of the public for the proposed improvement, and in case they find such necessity exists they shall award to the owners of such property and others interested therein such compensation therefor as they shall deem just.* If any such private property shall be subject to a mortgage, lease, agreement or other lien, estate or interest, they shall apportion and award to the parties in interest such portion of the compensation as they shall deem just.

"Sec. 3400: To assist the jury in arriving at their verdict the court may allow the jury, when they retire, to take with them the petition filed in the case and a map showing the location of the proposed improvement, and of each and all the parcels of property to be taken, and may also submit to them a blank verdict which may be as follows:

PART I.

"We find that it is.....necessary to take the private property described in the petition in this cause, for the use and (or) benefit of the public, for the proposed public improvement.

PART II.

"The just compensation to be paid for such private property we have ascertained and determined, and hereby award as follows:"

(Here follows schedule with the following headings:)

Description of each of the several parcels of private property to be taken.

Owners, occupants, and others interested in each parcel.

Compensation.

To whom payable.

"The different descriptions of the property and the names of the occupants, owners, and others interested therein, may be inserted in said blank verdict, under the direction of the court, before it is submitted to the jury, or it may be done by the jury.

"Sec. 3403: *Any person whose property may be taken, considering himself aggrieved, may appeal from the judgment of the court confirming the verdict of the jury* by filing in writing with the clerk of said court a notice of such appeal within five days after the confirmation, and within the same time serving a copy thereof on the city or village attorney, or prosecuting attorney of the county, and filing a bond in said court, to be approved by the judge thereof, conditioned for the prosecution of said appeal to judgment and the payment of all costs, damages and expenses that may be awarded against him, in case the judgment of confirmation shall be affirmed. Such appeal shall be perfected within the same time and prosecuted as an appeal in chancery, as near as may be, subject to the provisions of this act.

"Sec. 3406: When the verdict of the jury shall have been finally confirmed by the court, and the time in which to take an appeal has expired, or, if an appeal is taken, on the filing in the court below of a certified copy of the order of the Supreme Court affirming the judgment of confirmation, it shall be the duty of the clerk of the court to transmit to the common council, board of trustees or board of supervisors, a certified copy of the verdict of the jury, and of the judgment of confirmation, and of the judgment, if any, of affirmance; and thereupon, the proper and necessary proceedings in due course shall be taken for the collection of the sum or sums awarded by the jury. *If the common council, or board of trustees, or board of supervisors, believe that a portion of the city, village or county in the vicinity of the proposed improvement will be benefited by such improvement, they may, by an entry in their minutes, determine that the whole or any just proportion of the compensation awarded by the jury shall be assessed upon the owners or occupants of real estate deemed to be thus benefited; and thereupon they shall, by resolution, fix and determine the district or portion of the city, (or) village or county benefited, and specify the amount to be assessed upon the owners or occupants of the taxable real estate therein. The amount of the benefit thus ascertained shall be assessed upon the owners or occupants of such taxable real estate, in proportion as nearly s may be, to the advantage which such lot, parcel or subdivision is deemed*

to acquire by the improvement. The assessment shall be made and the amount levied and collected in the same manner and by the same officers and proceeding, as near as may be, as is provided in the charter of the municipality for assessing, levying and collecting the expense of a public improvement when a street is graded. The assessment roll containing said assessments, when ratified and confirmed by the common council, board of trustees, or board of supervisors, shall be final and conclusive, and prima facie evidence of the regularity and legality of all proceedings prior thereto, and the assessment therein contained shall be and continue a lien on the premises on which the same is made, until payment thereof. Whatever amount or portion of such awarded compensation shall not be raised in the manner herein provided, shall be assessed, levied and collected upon the taxable real estate of the municipality, the same as other general taxes are assessed and collected in such city, village or county. At any sale which takes place of the assessed premises, or any portion thereof, delinquent for non-payment of the amount assessed and levied thereon, the city, (or) village or county, may become a purchaser at the sale."

On the 14th of November, 1893, a resolution (R., p. 8) was passed by the common council of the City of Detroit, providing for the opening and extending of Milwaukee avenue.

On the 6th of January, 1894, the petition (R., p. 8) of the City of Detroit, for the opening and extending of Milwaukee avenue was filed in the Recorder's Court of the City of Detroit.

On the 6th day of March, 1894, the verdict of the jury was rendered and judgment entered thereon, condemning certain lands, and fixing the total amount of the damages for taking lands, at the sum of $15,214.75.

On the 7th day of August, 1894, a resolution was passed by the common council, fixing an assessment district, and providing for the assessment of the total amount of the damages on the property described in the resolution *"in proportion, as near as may be, to the advantage which such lot or parcel is deemed to acquire by such improvement,"* and of this amount the sum of $1,356 was assessed on the lands of complainants.

A bill was filed in the Circuit Court for the County of Wayne, in Chancery, (that being the State court of original jurisdiction), and after a hearing on the merits, a decree was entered dismissing the bill of complaint, and this decree was affirmed by the Supreme Court of the State of Michigan.

The errors relied upon are:

1. That the Supreme Court of Michigan erred in sustaining the statute against the objection that it is in conflict with the Fourteenth Amendment to the Constitution of the United States, in that it provides for taking property without due process of law.

2. That said court erred in sustaining the proceedings taken under said statute against the objection that they are in conflict with the Fourteenth Amendment to the Constitution of the United States, in that they deprived the complainants of property without due process of law.

I.

COMPILED LAWS, Sec. 3394, provides for the filing of a petition by the city attorney for the condemnation of land, and that the petition, among other things, shall contain "a description of the property to be taken, * * * also the names of the owners and others interested in the property, so far as can be ascertined, including those in possession of the premises."

Sec. 3395 provides that the clerk of the court shall issue a summons against the respondents named in the petition, requiring them to appear before the court at the time named therein, and show cause why the prayer of said petition should not be granted.

Sec. 3403 provides: "Any person whose property may be taken, considering himself aggrieved, may appeal from the judgment of the court confirming the verdict of the jury, etc."

The foregoing is the substance of all the provisions contained in the statute for giving notice to any persons in

regard to the proceedings for condemning lands and fixing the amount of compensation.

While the statute provides for a notice to the parties whose land is to be taken for the street, no provision is made for giving notice to the owners of the land liable to be assessed for the improvement. The owners of property liable to be assessed to pay for the opening of the street, are just as much interested in the question as to the necessity of making the improvement, and the amount of compensation, as the owners of lands to be taken for such street, and the same reasons for notice apply in the one case as in the other.

As the statute does not provide for any such notice or hearing, or any tribunal where the land owners liable to assessment can have a hearing as to those questions, it is in violation of the Fourteenth Amendment to the Constitution of the United States.

Paul vs. City of Detroit, 32 Mich., 108.
Commissioners vs. Fahlor, 132 Ind., 426.
State ex rel. Flint vs. Fond du Lac, 42 Wis., 287.
Stewart vs. Palmer, 74 N. Y., 183.
Scott vs. City of Toledo, 36 Fed. Rep., 385.

In Paul vs. City of Detroit, 32 Mich., 108, which was a proceeding to lay out an alley and assess for the expenses, the Court say (page 116): "Personal notice is to be given to owners and occupants of property intended to be taken, if found, or notice posted on the premises. No notice is provided for to the parties on whom the burden is to be charged, and want of notice to any one is not to oust the jurisdiction. *We can only conjecture that this omission was accidental as notice is just as necessary to the persons liable to pay for the alley as to those whose lands are taken, but both have a right to be heard before the jury.*"

In Commissioners vs. Fahlor, 132 Ind., 426, the Court say: "Notice is essential to confer jurisdiction in proceedings for the establishment of a public road, where an adjacent owner's land is sought to be subjected to a special assessment."

In State ex rel. Flint vs. Fond du Lac, 42 Wis., 287, the plaintiff was the owner of land assessed to pay damages for opening a street, but was not the owner of any land taken

for the street, and he brought certiorari to set aside the proceedings. The Court say (page 298): "But we think the proceedings were fatally defective because the charter makes no provision for giving a proper notice to the owner, of the time and place for the appointment and meeting of the jury, which determines the necessity of taking his property. Where the owner is known, and lives, or has an agent or tenant living, within the municipality, a personal notice of these steps is essential, and must be given, or the proceedings will be void. * * * (299). It is true, the property of Mr. Robert Flint was not taken for the street, but was assessed for benefits resulting from the improvement. Such an assessment of benefits is doubtless an exercise of the taxing power, as contended for by the counsel for the city; still *the relator is in a position to object that the proceedings for the condemnation of the land were illegal and void. For the benefits to her property consequent upon the opening of the street vitally depend upon the question whether the power of eminent domain has been properly exercised in procuring the right of way. This seems quite obvious. It follows from these views, that on account of the failure of the charter to provide for the giving of personal notice to the owner of the property of the time and place of the appointment and meeting of the jury, to inquire into and determine the necessity, the proceedings were void.*"

In Stewart vs. Palmer, 74 N. Y., 183, which was an action to restrain the collection of an assessment for improving a street, where the act under which the proceedings were had, while it provided for a notice and hearing as to the persons whose land was to be taken, did not contain any express provision for the notice and hearing of parties who were assessed to pay for such improvement, the Court say (page 188): "Here was an expense for local improvement of more than one hundred thousand dollars. The commissioners were to ascertain what land within the district of assessment was benefited, and then to apportion and assess the said sum upon such land in proportion to benefits. The assessment, when made, was declared to be a lien upon the land, and its payment could be enforced by a sale thereof. *I am of opinion that the Constitution sanctions no law imposing such an assessment without a notice to and a hearing or an opportunity of a hearing by the owners of the property to be assessed. It is not enough that the owners may by chance have notice or that they may as a matter of favor have a hearing. The law must require notice to them and give them a right to a hearing or an oppor-*

tunity to be heard. * * * (190). Can it be that when the public takes land for a public highway the owners thereof are entitled to a hearing as to the compensation which they are to receive, and yet that the lands on both sides of the highway may be assessed to pay such compensation to their entire value, without any opportunity on the part of the owners to be heard. The legislature can no more arbitrarily impose an assessment for which property can be taken and sold, than it can render a judgment against a person without a hearing."

In Scott vs. City of Toledo, 36 Fed. Rep., 385, which was an action to restrain an assessment on a street opening case, Mr. Justice Jackson, in delivering the opinion of the Court, says (page 397): "The owner must in some form, in some tribunal, or before some official authorized to correct errors or mistakes, have an opportunity before him to be heard in respect to the proceedings under which his property is to be taken or burdened, before the tax and assessment becomes final and effectual, in order to constitute such procedure due process of law. If a tax or assessment can under the state law be enforced or collected only by legal proceedings in which any and all defenses going either to the validity or amount of such tax or assessment may be made, that will afford the opportunity to be heard, and in such cases the proceedings cannot be said to deprive the owner of his property without due process of law, however objectionable or unjust it may be otherwise. * * * (400) The common council of Toledo having made the assessment in question, without notice to or opportunity for hearing by complainant, and having the right to enforce its collection by distraining and selling their property without resorting to any suit which would give them an opportunity to interpose any defense, either to the validity or amount of said assessment, its action in the premises, even if authorized by the statutes of Ohio, is wanting in that 'due process of law' required by the federal constitution, before depriving a citizen of his property."

II.

Sec. 3406, Compiled Laws of the State of Michigan of 1897, provides: * * * "If the common council, or board of trustees, or board of supervisors, believe that a portion of the city, village or county in the vicinity of the proposed improvement will be benefited by such improvement, they may by an entry in their minutes determine that the whole or any just proportion of the compensation awarded by the jury shall be assessed upon the owners or occupants of real estate deemed to be thus benefited, and thereupon they shall by resolution fix or determine the district or portion of the city, village or county benefited, and specify the amount to be assessed upon the owners or occupants of the taxable real estate therein. The amount of the benefit thus ascertained shall be assessed upon the owners or occupants of such taxable real estate, in proportion, as nearly as may be, to the advantage which such lot, parcel or subdivision is deemed to acquire by the improvement. * * * The assessment roll containing said assessments when ratified and confirmed by the common council, board of trustees, or board of supervisors, shall be final and conclusive and prima facie evidence of the regularity and legality of all proceedings prior thereto, and the assessment therein contained shall be and continue a lien on the premises on which the same is made, until payment thereof, etc."

This statute is in violation of the 14th Amendment to the Constitution of the United States, for the following reasons:

(a) Because the statute authorizes the common council to fix the district claimed to be benefited, without providing for any hearing by the parties whose lands are included in the district, as to whether all the land benefited by the improvement is included in the district, and whether the taxpayer's lands should be included in the district or not.

This district is fixed by the common council ex parte, and the taxpayer can have no relief, even though it should

be conclusively shown that property especially benefited has been omitted from the district, or that his property is not benefited and should not have been included in the district.

(b) Because the statute does not afford the property owner notice and opportunity to be heard as to whether the amount imposed upon the district by the common council is not in excess of the total benefits received by the district.

The common council, under the statute, conclusively determine the amount to be assessed upon the dsitrict, and the only duty left to the assessors in making the assessment is to apportion that amount upon the property in the district, *in proportion to the benefits*, and does not limit the amount to be assessed upon such property to the amount of the benefits accruing from such improvement.

The determination by the aldermen of the land benefited, and the amount to be assessed upon the land, is judicial in its nature, and cannot be binding upon the taxpayer, and the taxpayer is entitled to a hearing before his rights are finally determined by such action.

Sears vs. Street Commissioners, 173 Mass., 350 355.
Murdock vs. City of Cincinnati, 39 Fed. Rep., 891.

In Sears vs. Street Commissioners, 173 Mass., 350-355, the Court say (page 355): "It is well established that the determination of the amount of taxes for special benefits to real estate by any tribunal to which the legislature delegates the power, is a quasi judicial proceeding which cannot take final effect unless the persons to be assessed have an opportunity to be heard."

(c) Because the statute, by its express terms, authorizes the city council to assess the whole, or any just proportion, of the amount awarded by the jury, upon the lands in such assessment district, without limiting such

assessment to the amount which the lands included in such district are benefited by the improvement.

Detroit vs. Judge of Recorder's Court, 112 Mich., 588.
Norwood vs. Baker, 172 U. S., 269.
Tidewater Co. vs. Costar, 18 N. J. Eq., 518.
State vs. Newark, 37 N. J. L., 415.
New Brunswick vs. Commissioners, 38 N. J. L., 190.
Barnes vs. Dyer, 56 Vt., 469.
Stewart vs. Palmer, 74 N. Y., 183.

In City of Detroit vs. Judge of Recorder's Court, 112 Mich., 588, which was an action of mandamus to compel the respondent to reinstate proceedings which he had quashed, on the ground that the charter of Detroit providing for assessing the damages for opening streets, was unconstitutional, the Court say (page 589): "The theory upon which such assessments are sustained as a legitimate exercise of the taxing power, is that the party assessed is locally and peculiarly benefited, over and above the necessary benefit which as one of the community he receives in all public improvements, to the precise extent of the assessment. * * * So a law directing such an assessment as the commissioners should deem '*just and equitable*' was held unconstitutional, because it did not direct the fact to be found that the property was benefited to the amount of the tax imposed. * * * Applying this rule to this act, it must be declared void. It contains no provision which requires an assessment upon the local district to be in proportion to the benefits received. The common council are not required to determine when they establish the district to what extent it is benefited."

In Tidewater vs. Costar, 3 C. E. Green (18 N. J. Eq.), 518, where the act provided for the organization of a company to drain certain lands, and the appointment of commissioners who "*shall assess upon the said lands so reclaimed a just proportion of the contract price and of the expenses of said commission,*" and commissioners were appointed and an assessment made, and it was objected that the tax was invalid for the reason that the act did not limit the assessment to the amount of benefit to the land. The Court say (page 526): "But looking more closely into the structure and effect of this statute, there appears to be a defect which seems to be both radical and incurable, and so must prevent its judicial enforcement.

The defect alluded to is this: No provision is made for the indemnification of the owner of the land subject to the operation of this law in case the expense of the improvement shall exceed the benefits which shall be conferred. The act authorizes the entire expense of drainage to be imposed upon the lots, whether such expense falls below or rises above the increase in value which may accrue to the land by reason of such drainage. * * * The statute does not require that the apportionment of expense shall be limited as the maximum rate by the increase in value to result from the improved condition of the land. Now, therefore, it seems to me obvious that if this scheme be carried into effect, in the event of an excess of expense over benefits, private property pro tanto will be taken for public use without compensation."

In New Brunswick Co. vs. Commissioners, 38 N. J. L., 190, which was certiorari to review an assessment for the construction of sewers, where the statute provided for the appointment of commissioners of streets, and authorized them to construct sewers and drains and "shall ascertain the whole cost thereof and the size of all lots or separate parcels of ground drained thereby, and shall fix the amount to be paid for each in such proportions as may in the judgment of such commissioners be just and equitable." The Court say (page 192): "The power to tax for the expense of local public improvements, lots peculiarly benefited by such improvements, in proportion to and to the extent of the benefits received, when properly authorized by legislative enactment, is not drawn in question in these cases. The claim of the prosecutor is that there is no law authorizing such tax in this case; that the act under which the commissioners have sought to impose this special assessment is invalid. * * * An act of the legislature directing a tax for local improvements to be imposed upon particular lots, to be legal or effectual, must consist of something more than the mere authorization to assess a sum of money, the cost of a local improvement, upon the designated property. The act must determine the mode of distributing the burden. The property out of which the tax is to be made must be designated and some certain standard of assessment established. It cannot properly be left by the legislature to the discretion of others to fix the method. * * * The only safe rule is that the statute authorizing the assessment shall itself fix, either in terms or by fair implication, the legal standard to which such assessment must

be made to conform. In no other way can property be adequately protected."

In Barnes vs. Dyer, 56 Vt., 469, which was an action brought to recover an assessment, where the statute empowered the authorities of the city to construct sidewalks and make local assessments on the property fronting on the same "*for so much of the expense thereof as they shall deem just and equitable,*" and it was objected that the words "just" and "equitable" did not define a legal standard of assessments, the Court say (page 471): "The cases differ somewhat as to how the benefit may be determined, whether by the frontage or superficial area, but no such question arises here. The only question here is whether the phrase '*as they shall deem just and equitable*' is sufficiently certain as a standard of assessment. * * * The act in question makes no express allusion to assessment on account of benefit, neither does it limit the assessment to the amount of benefit, yet, as we have seen, the right to assess at all depends solely on benefit, and must be apportioned to and limited by it. An improvement might cost double the benefit to the lands particularly benefited. * * * (473.) We think the act in question failed to set up a standard by which all assessments for sidewalks in Vergennes must be made. That the words 'just' and 'equitable' do not import with reasonable certainty a limitation to particular benefits to property benefited, we do not think, but that one member of the common council construed the words as applying to one consideration, and another member to another consideration, nor that any of them limited the consideration to benefits. In short, the enactment was inadequate to the purpose designated by it."

III.

The resolution of the common council directing the assessment is as follows:

"Resolved, That the common council of the City of Detroit, do hereby fix and determine that the following district and portion of said City of Detroit, to wit (here follow descriptions), is benefited by the opening of Milwaukee avenue from Chene street to Mt. Elliott avenue, where not already opened; and further resolved, that there be assessed and levied upon the several pieces and parcels of real estate, included in the above description,

the amount of $15,214.75, in proportion as near as may be to the advantage which such lot or parcel is deemed to acquire by such improvement; and further resolved, that the board of assessors of said City of Detroit, be, and they are hereby directed to proceed forthwith to make an assessment roll in conformity with the requirement of the charter of the City of Detroit relating to special assessments for collecting the expenses of such improvement when a street is graded, comprising the property hereinbefore described, upon which they shall assess and levy the amount of $15,214.75, each lot or parcel to be assessed a ratable proportion, as near as may be, of said amount, in accordance with the amount of benefit derived from such improvements."

This resolution is in conflict with the 14th amendment to the Constitution of the United States, for the following reasons:

(a) Because it does not find that the property included in the assessment district is benefited to the amount ordered to be assessed upon such district.

Adams vs. Bay City, 78 Mich., 211.
Greely vs. The People, 60 Ill., 19.
Crawford vs. The People, 82 Ill,. 557.
Chamberlain vs. Cleveland, 34 O. St., 551.
Dyar vs. Farmington, 70 Me., 515.

In Adams vs. Bay City, 78 Mich., 211, which was an action to recover back money paid under protest for an assessment levied for the construction of a sewer, and it was objected that the records did not show that the benefits equaled the cost of the work, the Court say (page 215): "Nowhere, then, does it appear, unless taken for granted, that the benefits of this work equal the tax laid by the controller, or that the lands were assessed in proportionment to the benefits specially derived by them from such work. We think that this cannot be taken as granted; that this roll should show expressly that the assessment was made on the basis which the charter lays down, and this is not an irregularity which is cured by the provision that the roll after endorsement shall be prima facie evidence of the validity of the tax. It is jurisdictional and must appear upon the roll, and we think it should also appear somewhere that the benefits to the whole property included in the taxing district would equal the whole cost of the proposed work. * *

* Under the section as it stood when this tax was laid, the whole cost was laid on the property specially benefited. The plaintiff had a right to demand that there should be a finding of benefits, and that also it should appear on the assessment roll or somewhere on the record, in what manner these benefits were apportioned and under what rules. He had a right to know upon what standard or basis the controller acted, that he might ascertain whether or not it was a legal one."

In Chamberlain vs. Cleveland, 34 Ohio St., 551, which was an action to set aside certain assessments for opening a street, where the statute provided that "in all cases in which it was determined to assess the whole or any part of the cost of any improvement upon the lots or lands bounded or abutting upon the same, or upon other lots or lands benefited thereby, the council may require the board of improvements, or may direct three disinterested freeholders of the corporation or of the vicinity, to report to the council an estimated assessment of such costs on the lots or lands to be charged therewith, in proportion, as nearly as may be, to the benefits which may result from the improvement of the several lots or parcels of land so assessed," etc. The common council passed a resolution ordering the board of improvements to prepare an estimated assessment, as required by law, and afterwards the board of improvements submitted an "estimated assessment upon the property benefited, to pay the damages and costs incurred in opening and extending Bond street."

The Court says (page 564): "It is claimed that the assessment is invalid and void on the ground that it fails to show that it is based upon the value of the special benefits conferred by the opening of the street, or that it is properly apportioned, and that these things are apparent on the face of the proceedings which are made a part of the record. It seems to us that this objection is well taken. It is essential to the validity of an assessment that the proceedings by which it is made must show upon their face that the requirements of the law have been substantially complied with, and that the restrictions imposed by law upon the exercise of the power have been observed in such a way that the owner of the lot assessed has had the benefit of the protection they were intended to give. * * *

(571) When the municipal authorities in levying special assessments do not undertake to determine the amount of the special benefits conferred, either in respect to the amount assessed, or in the apportionment of the

burden, the assessment may be enjoined, and in an action for that purpose parol evidence may be introduced to show that the authorities did not act on the proper basis."

(b) Because the resolution of the common council directed the assessors to make an assessment roll, "upon which they shall assess and levy the amount of $15,214.75, each lot or parcel to be assessed a ratable proportion, as near as may be, of said amount, in accordance with the amount of benefit derived from such improvements."

By this resolution the assessors were not directed to assess upon each piece of property only such amount as it was benefited, but were directed to assess the entire amount ratably upon the various lots, in proportion to the benefit to each lot, although such assessment might be several times the amount of the benefit; and while the proportion may have been maintained as between the various parcels of property, still the assessment was not limited to the benefit to each lot, and was void.

Greely vs. The People, 60 Ill., 19.

In Greely vs. The People, 60 Ill., 19, which was an appeal from a judgment of the court sustaining taxes levied for the improvement of a highway upon certain lots, and it was objected that the resolution of the common council was defective for the reason that it did not find that the land would be benefited to the amount of the assessment, the Court say (page 21): "The ordinance directing the special assessment orders the sum of $125,200.11 to be assessed 'upon the real estate deemed benefited by such improvement, in proportion, as near as may be, to the special benefits resulting to each separate lot or parcel thereof.' * * * It will be perceived at once that this ordinance is fatally defective. It assumes there is property which will be specially benefited to the extent of this very large assessment, although the town has taken no measure to ascertain that fact, but arbitrarily directs the imposition of this sum as a tax upon property benefited, though it might well be that the aggregate of all special benefits to be derived from the improvement would be but a small fraction of the sum assessed. * * * The principle of proportion between different lots was indeed preserved, but that was all. Inasmuch, then, as the ordinance disregards the principle of equality between burden and benefit, and imposes this tax upon the

property benefited, though the benefit may be but a fraction of the tax, we must hold it void upon principles well settled in this court."

IV.

It appears from an inspection of the petition and verdict of the jury, that there were several of the parcels of land constituting the extension of Milwaukee avenue, that were so defectively described that the judgment of condemnation was absolutely void, among which were the following:

"Commencing at the intersection of the westerly line of said lot 2, and the southerly line of Milwaukee avenue, thence south 64 degrees west 443.40 feet, thence south 79 degrees 4 inches west 230.64 feet, thence south 64 degrees west 222.14 feet, thence south 27 degrees 44 inches east 60.03 feet to the place of beginning."

It will be observed that this simply describes a line, and does not describe any piece of land whatever, as all the courses exceept the last course are southwest.

Also the following:

"Between lines of Joseph Campau avenue extended."

"60 feet of east 101.20 feet east of and adjoining Joseph Campau avenue extended."

"20 feet of east 121.20 feet east of and adjoining Joseph Campau avenue extended."

"West 101.20 feet lying west of and adjoining Mitchell avenue extended."

"East 100 feet lying east of and adjoining Mitchell avenue extended."

"East 20 feet of east 120 feet lying east of and adjoining Mitchell avenue extended."

"West 100 feet lying west of and adjoining McDougall avenue extended."

It will be observed that Milwaukee avenue runs substantially east and west; that these descriptions of land extend north and south; but it does not appear what parts of these descriptions are taken, whether it is the

north end, or the south end, or the middle, so that the land to be taken is not described in any manner.

And the map, which is attached to and made a part of the petition (R., 13), does not show what descriptions, if any, were taken. The part of the street which was opened by these proceedings is printed in red, but the lots and parts of lots which are taken cannot be ascertained from the map.

It also appears (R., 27) that the Dime Savings Bank had a mortgage of five hundred dollars on two lots of land taken in the street opening proceedings, and that the Dime Savings Bank was not made a party to such action, so that the interests of the Dime Savings Bank in said lots were not condemned.

As the petition of the City of Detroit, and the certified copy of the resolution to the common council, attached thereto, do not describe the several parcels of land to be taken for such improvement, the court has no jurisdiction to proceed in the matter.

Matthias vs. Drain Com'n., 49 Mich., 465.
Toledo Ry. Co. vs. Munson, 57 Mich., 42.
Ry. Co. vs. Circuit Judge, 95 Mich., 318.
Galena, Chicago Ry. Co. vs. Pound, 22 Ill., 399.
Chicago & N. W. Ry. Co. vs. Chicago, 132 Ill., 372.
Re N. Y. Central & Hud. R. Ry. Co., 70 N. Y., 191.
Cal. Central Ry. Co. vs. Hooper, 76 Cal., 404.

In Matthias vs. Drain Commissioner, 49 Mich., 465, where the petition to the Probate Court for the appointment of commissioners described the ditch as a line but gave no width, the Court say: "Where land is to be taken from the owner for public purposes, the description should be as definite as is necessary in a deed, and if several successive steps are to be taken in the course of which the land must be identified and described, the description should be sufficient in every instance that it may be seen that the successive steps are not referable to different premises."

In Toledo Railway Co. vs. Munson, 57 Mich., 42, which was an appeal from the Probate Court, where it was alleged that the petition was not sufficient to confer juris-

diction on the Court, the Court say (page 44): "It is, therefore, proper here to point out that the petition filed as the foundation of these proceedings, was insufficient to confer jurisdiction because it did not comply with the requirement of the statute prescribing what such petition should contain. *The law requires that each distinct parcel of land shall be described, and the owner thereof, if known, shall be named.*"

In Railway Company vs. Circuit Judge, 95 Mich., 318, which was an application for a mandamus to compel respondent to appoint commissioners to condemn certain lands for the railway, where the petition stated that it was necessary "to use and occupy a strip, piece or parcel of land, not exceeding 18 feet, lying between the outer limit of the land actually occupied by the roadbed of said Detroit & Saline Plank Road Company, and the sidewalk line as established, and liable to be established and as shown by the map and survey herewith filed and such crossings, switches, sidings and connections therewith, as may be essential and necessary." The Court say (page 320): *"Where land is to be taken for public purposes the description should be as definite as is necessary in a deed."*

In re N. Y. Central & Hudson R. Ry. Co., 70 N. Y., 191, to condemn certain lands, where it was claimed that the description of the land was insufficient, the Court say (page 193): "The description of the first parcels of land set forth in the petition which the company seeks to acquire in these proceedings is manifestly defective. *The statute declares that the petition must contain a description of the real estate which the company seeks to acquire, and this provision cannot be complied with unless there is such a description of the land as will show its location and the boundaries thereof.*"

In California Central Ry. Co. vs. Hooper, 76 Cal., 404, which was an action to condemn the right of way for a railroad, where it was objected that the petition did not describe the land sought to be condemned, it was held that the complaint in a proceeding to condemn a right of way for a railroad company must contain a description of each parcel of land sought to be taken, whether the same includes the whole or only part of an entire tract, and the judgment must be so far certain as that the parties and any ministerial officer who may be called on to enforce it, may know what land is to be taken and paid for.

The verdict of the jury follows substantially the same descriptions given in the petition, and does not contain any description of the several parcels of land taken, and contains no data from which the several parcels of property condemned can be ascertained, and is, therefore, void.

Milton vs. Drain Commissioner, 40 Mich., 229.
Railway Company vs. Hitchcock, 90 Mich., 533.
Vail vs. Morris & Essex R. R. Co., 21 N. J. L., 129.

In Milton vs. Drain Commissioner, 40 Mich., 229, where the report of the commissioners did not show the width of the drain or the land which was to be taken, the Court say (page 332): *"The defect in the present case is vital. There is nothing in the record which makes known what specific land, if any, has been condemned."*

In Railway Company vs. Hitchcock, 90 Mich., 533, which was an appeal from the proceedings in the Probate Court of Bay County, condemning the right of way for the railroad, it appeared that the lands of the relators consisted of three parcels, situated some distance apart, and it appeared that one of the lots had a frontage of 566 feet instead of 489 feet, as set forth in the petition. The Court say (page 544): "In the verdict of the jury the frontage of the first parcel is not given, although the frontage is made to conform with the frontage mentioned in the petition as to the other two parcels. The same omission occurs in the order of confirmation. We think this objection fatal to the award and, in fact, to the petition in its present form. It is always required that the petition must state with accuracy the quantity of land to be taken, etc."

In Vail vs. Morris & Essex R. R. Co., 21 N. J. L., 189, which were proceedings to condemn land for a railroad, it was held that the award of the commissioners under the act must contain a clear description of the land taken with reference to permanent monuments, and with definite and intelligible boundaries.

The proceedings being void the city did not acquire title to the street through such parcels, and not having acquired title it would have no authority to levy a tax to pay for such parcels, and as the amount of damages awarded by the jury, and the amount assessed upon the

property, included the sums allowed as compensation for such property, the assessment is unauthorized and void.

Brush vs. City of Detroit, 32 Mich., 42.
Detroit, M. & T. R. R. Co. vs. Detroit, 49 Mich., 47.
Lawrence vs. Armstrong, 3 Missouri App., 574.

In Brush vs. City of Detroit, 32 Mich., 42, which was certiorari to Recorder's Court to review a street opening case, where the jury fixed the damage to the plaintiff at $1,400 and assessed the benefits at $1,900, and determined that the plaintiff should pay the sum of $500 and the assessment was made for that amount; and it appeared that some of the parties had not been served, among them the plaintiff, with notice of the hearing, and it was objected that as the land had not been condemned, the assessment was unauthorized, the Court say (page 43): "The record fails to show whether any of the other parties whose lands were sought to be condemned in the same proceeding and for the same street, were personally notified, and hence it fails to show whether the proceeding eventuated in the legal assessment of the street, and yet the proceeding was entire, and so was the object of it. If as to any of the parties no valid street was laid in consequence of the want of proper notice to any of the land owners, it is difficult to see how the street can be regarded as lawfully established as against the relator, so as to compel him to pay the city money for benefiting him by the establishment of the street. * * * The proceeding, so far as it affects the relator, must be quashed."

In Detroit, Monroe & Toledo Ry. Co. vs. Detroit, 49 Mich., 47, which was certiorari to review proceedings in opening Harper avenue, in the City of Detroit, Judge Campbell, in delivering the opinion of the Court, says (page 48): "It appears that in opening this avenue it will become necessary to cross the lands and to a greater or less extent interfere with the premises of several railroad companies, and that this involved the principal damages. One of these, the Lake Shore & Michigan Southern Ry. Co., was not even named in the proceedings, although the jury awarded damages for the land taken. *That company did not appear, and the taking of land and assessment of damages are invalid absolutely.* The Detroit, Grand Haven & Milwaukee Ry. Co. was named, and had lands taken and damages awarded, but did not appear, and was not lawfully served with process. * * * *The*

damages assessed to these two companies alone made up a considerable sum charged on the various parties in the assessment district as benefited by the proposed improvement, but the assessment is void if the land is not lawfully condemned, as it has not been, and the way cannot be lawfully established."

In Lawrence vs. Armstrong, 3 Mo. App., 574, where an assessment was made for the benefits accruing from a street opening, and it appeared that the street had not been properly opened, the Court say: *"Where street improvements have been made by a municipal corporation upon property which has not been dedicated or condemned to public use, there can be no recovery on a special tax bill issued after such improvements."*

These objections were made before the trial court, and also before the Supreme Court of the State of Michigan on appeal. But it was held by the Supreme Court that the judgment could not be collaterally attacked by complainants, although they were not made parties to the proceedings in any manner, and had no opportunity to be heard therein, or appeal from such judgment. In other words, the effect of the decision is to bind the complainants in this case by proceedings which are void upon their face for the want of jurisdiction, and such decision is in violation of the rights of the complainants under the 14th amendment to the Constitution of the United States, and is void.

The rights of no person can be concluded by the judgment in a case to which he is not a party.

Hill vs. Finch, 104 U. S., 261.

In Hill vs. Finch, 104 U. S., 261, the Court say: "It is scarcely necessary to say that that judgment is not conclusive of the rights of the present defendant. He was not a party to that action, or notified of its pendency. He had no opportunity or right in that case to controvert the claim of the Oregon Steam Navigation Co. to control the defense, to introduce or cross-examine witnesses, or to prosecute a writ of error to the judgment."

The effect of the decree of the Circuit Court for the County of Wayne, in chancery, dismissing the complain-

ants' bill, and the judgment of the Supreme Court of the State of Michigan in affirming such decree, is to deprive the complainants of the right of hearing in the original proceedings condemning the land for the street, and fixing the compensation, and also to deny them the right of contesting such proceedings in this or in any other case, and constitutes a denial of the rights of the complainants under the 14th amendment to the Constitution of the United States.

In Chicago R. R. Co. vs. Chicago, 166 U. S., 226, Mr. Justice Harlan says: "In our opinion, a judgment of the state court, even if it be authorized by statute, whereby private property is taken for the city, or under its direction for public use, without compensation made or secured to the owner, is upon principle and authority wanting in the due process of law required by the 14th amendment to the Constitution of the United States, and the affirmance of such judgment by the highest court of the state is a denial by that state of a right secured to the owner by that instrument."

We submit that the decree of the Supreme Court of the State of Michigan be reversed, and a decree entered as prayed for in complainants' bill.

ELBRIDGE F. BACON,
Counsel for Plaintiffs in Error.

No. 123.

Br. of Tarsney for D. E.

SUPREME COURT

OF THE UNITED STATES.

Filed Dec. 9, 1901.

OCTOBER TERM, 1901.

No. 17,853

JOHN C. GOODRICH and CLARENCE M. BURTON, *Plaintiffs in Error.*

vs.

THE CITY OF DETROIT, and LOUIS B. LITTLEFIELD, Treasurer of the city of Detroit, *Defendants in Error.*

No. 123.

ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

BRIEF OF TIMOTHY E. TARSNEY, Counsel for DEFENDANTS IN ERROR.

TIMOTHY E. TARSNEY,
Counsel for Defendants in Error.

DETROIT:
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No. 123.

Error to the Supreme Court of the State of Michigan.

(17,853.)

BRIEF FOR DEFENDANTS IN ERROR.

This case comes to this court upon a writ of error from a final decree confirming the decree of the court below, dismissing the complainants' bill of complaint.

Complainants are the owners of certain premises situated in the City of Detroit, including the assessment district fixed and determined by the common council of the City of Detroit upon the several lots and parcels of land within which had been ap-

portioned and assessed the amount of an award made by a jury in condemnation proceedings for the opening of Milwaukee Avenue in said city and the expenses incident thereto.

The validity of the act of the legislature under which the condemnation proceedings were had; the regularity of the proceedings thereunder in the condemnation of certain lands, and the fixing and determining of the assessment district, are called in question by complainants.

The act of the Legislature under which these proceedings were conducted is found in Compiled Laws of Michigan, 1897, Vol. 1, Sections 3392 to 3435. The particular provisions thereof which are inquestion here, are as follows:

> "Sec. 3394: The city, village or county clerk shall make and deliver to such attorney, as soon as may be, a copy of such resolution certified under seal, and it shall be the duty of such attorney to prepare and file in the name of the city, village or county, in the court having jurisdiction of the proceedings, a petition signed by him in his official character and duly verified by him; to which petition a certified copy of the resolution of the common council board of trustees or board of supervisors shall be annexed, which certified copy shall be prima facie evidence of the action taken by the common council, board of trustees or board of supervisors, and of the passage of said resolutions. The petition shall state, among other things, that it is made and filed as commencement of judicial proceedings by the municipality or county in pursuance of this act to acquire the right to take private property for the use and benefit of the public, without consent of the owners, for a public improvement, designating it, for a just compensation to be made. A description of the property to be taken shall be given and generally the nature and extent of the use thereof, that will be required in making and maintaining the improvement shall be stated and also the names of the owners and others inter-

ested in the property, so far as can be ascertained, including those in possession of the premises. The petition shall also state that the common council or board of trustees or board of supervisors has declared such public improvement to be necessary, and that they deem it necessary to take the private property described in that behalf for such improvement for the use or benefit of the public. The petition shall ask that a jury be summoned and empaneled to ascertain and determine whether it is necessary to make such public improvement, whether it is necessary to take such private property as it is proposed to take, for the use or benefit of the public, and to ascertain and determine the just compensation to be made therefor. The petition may state any other pertinent matter or things and may pray for any other or further relief to which the municipality or county may be entitled within the objects of this act.

"Sec. 3395: Upon receiving such petition, it shall be the duty of the clerk of said court to issue a summons against the respondents named in such petition, stating briefly the object of said petition, and commanding them, in the name of the People of the State of Michigan, to appear before said court, at a time and place to be named in said summons, not less than twenty nor more than forty days from the date of the same, and show cause if any they have, why the prayer of said petition, should not be granted.

"Sec. 3399: The jury shall determine in their verdict the necessity for the proposed improvement and for taking such private property for the use or benefit of the public for the proposed improvement, and in case they find such necessity exists they shall award to the owners of such property and others interested therein such compensation therefor as they shall deem just. If any such private property shall be subject to a mortgage, lease agreement or other

lien, estate or interest, they shall apportion and award to the parties in interest such portion of the compensation as they shall deem just.

"Sec. 3400: To assist the jury in arriving at their verdict the court may allow the jury, when they retire, to take with them the petition filed in the case and a map showing the location of the proposed improvement, and of each and all the parcels of property to be taken, and may also submit to them a blank verdict which may be as follows: * * *

"Sec. 3406: When the verdict of the jury shall have been finally confirmed by the court, and the time in which to take an appeal has expired, or, if an appeal is taken, on the filing in the court below of a certified copy of the order of the Supreme Court, affirming the judgment of confirmation, it shall be the duty of the clerk of the court to transmit to the common council, board of trustees or board of supervisors, a certified copy of the verdict of the jury, and of the judgment of confirmation, and of the judgment, if any of affirmance; and thereupon, the proper and necessary proceedings in due course shall be taken for the collection of the sum or sums awarded by the jury. If the common council, or board of trustees or board of supervisors, believe that a portion of the city, village or county, in the vicinity of the proposed improvement will be benefited by such improvement, them may, by an entry in their minutes, determine that the whole or any just proportion of the compensation awarded by the jury shall be assessed upon the owners or occupants of real estate deemed to be thus benefited; and thereupon, they shall by resolution, fix and determine the district or portion of the city (or) village or county benefitted and specify the amount to be assessed upon the owners or occupants of the taxable real estate therein. The amount of the benefit thus ascertained shall be assessed upon the owners or occupants of such taxable real estate, in proportion as nearly as may be, to the advantage which such lot,

parcel, or subdivision is deemed to acquire by the improvement. The assessment shall be made and the amount levied and collected in the same manner and by the same officers and proceeding, as near as may be, as is provided in the charter of the municipality for assessing, levying and collecting the expense of a public improvement, when a street is graded. The assessment roll containing said assessments, when ratified and confirmed by the common council, board of trustees, or board of supervisors, shall be final and conclusive, and prima facie evidence of the regularity and legality of all proceedings prior thereto, and the assessment therein contained shall be and continue a lien on the premises on which the same is made until payment thereof? Whatever amount or portion of such awarded compensation shall not be raised in the manner herein provided, shall be assessed, levied and collected upon the taxable real estate of the municipality, the same as other general taxes are assessed and collected in such city, village or county. At any sale which takes place of the assessed premises, or any portion thereof, delinquent for non-payment of the amount assessed and levied thereon, the city (or) village or county, may become a purchaser at the sale."

On the 14th day of November, 1893, a resolution was adopted by the common council of the City of Detroit, as follows:

"By Alderman Scovel:

Resolved, That the common council of the City of Detroit hereby declare it to be necessary to make a public improvement in the City of Detroit by opening and extending Milwaukee Avenue between Chene Street and Mt. Elliot Avenue, where not already opened, 60 feet wide (Except between the Boulevard and Collins Street where said avenue shall be an average width of 67.10 feet) for the use

and benefit of the public as a public street and highway and that they hereby declare that they deem it necessary to take the private property hereinafter described for such public improvement, to-wit: Opening and extending Milwaukee Avenue between Chene Street and Mt. Elliot Avenue, where not already opened 60 feet wide (Except between the Boulevard and Collins Street, where said avenue shall be an average width of 67.10 feet), for the use and benefit of the public as a public street and highway; that such improvement is for the use and benefit of the public; that the private property which they deem it necessary to take for the purposes of making such improvement, is more particularly described as lying and being in the City of Detroit, County of Wayne, and State of Michigan, bounded as follows: (Here follows description of property.)

(2) It is further resolved by the common council of the City of Detroit that the city attorney be and is hereby directed to institute the necessary proceedings in behalf of the City of Detroit, in the Recorder's Court of the City of Detroit, to carry out the objects of this resolution." (Rec., p. 12.)

January 6th, 1894, the petition of the City of Detroit for the opening and extending of Milwaukee Avenue, in accordance with said resolution was filed in the Recorder's Court, a copy of which petition is printed in the record, Exhibit I, pp. 8-14.

A map or plan of the private property proposed to be taken certified to as correct by the city engineer was made a part of said petition, by the 6th paragraph thereof (Rec., p. 14), which said map or plan was marked Ex. B, printed in the record between pp. 12 and 13.

The owners and persons interested in said real estate proposed to be taken, were duly summoned; a jury was empaneled and such proceedings were taken thereunder that a hearing

thereof was had and a finding made by said jury. (Rec., pp. 15-18.)

It appears from the bill of complaint, paragraph 5, Rec., pp. 3-4, that the verdict of the jury was confirmed by the Recorder's Court. Thereafter, on the 7th day of August, 1894, a resolution was adopted by the common council, which is fully set out in the seventh paragraph of the bill of complaint. (Rec., p. 3.)

This resolution was, on the 20th day of November, 1894, rescinded, and thereafter, on the 22nd day of January, 1895, the following resolution, contained in paragraph 11 of the bill of complaint, Rec., pp. 3-4, was adopted:

> "Resolved, That the said common council of the City of Detroit, do hereby fix and determine that the following district and portion of said City of Detroit, to-wit: (Here follows list of descriptions, many of which are different from those in first assessment district) is benefitted by the opening of Milwaukee Avenue, from Chene Street to the easterly city limits, where not already opened; and further, resolved, that there be assessed and levied upon the several pieces and parcels of real estate included in the above descriptions, the amount of $15,214.75, in proportion, as near as may be, to the advantage which each lot or parcel is deemed to acquire by this improvement. And further resolved, that the board of assessors of the City of Detroit, be and they are hereby directed to proceed forthwith to make an assessment roll in conformity with the requirements of the charter of the City of Detroit relating to special assessments for collecting the expense of public improvements when a street is graded, comprising the property hereinbefore described, upon which they shall assess and levy the amount of $15,214.75 each lot or parcel to be assessed a rateable proportion, as near as may be, of said amount in accordance to the amount of benefit derived by such improvements."

March 12th, 1895 the assessors reported an assessment roll, No. 58. for defraying the expenses of opening Milwaukee Avenue, which said assessment was confirmed by the common council April 4, 1895. See paragraphs 12 and 13, Rec. ,p. 4.

The property of complainants was included in the assessment district so fixed and determined by the common council and was assessed, as stated in the 14th paragraph of the bill of complaint, Rec., pp. 4 and 5.

The complainants filed a bill of complaint in the Circuit Court for the County of Wayne, in chancery. Rec., p. 1-4.

Defendants answered. Rec., p. 19.

After the hearing in said court, a decree was entered dismissing the complainants' bill. Rec., p. 26.

From this decree an appeal was taken to the Supreme Court of the State of Michigan, where the same was affirmed.

The assignment of error, Rec., pp. 38-39 are very general and I will treat the questions discussed in the brief by counsel for the plaintiff in error.

I.

On page 6 of the brief for the plaintiffs in error, it is stated that the errors relied upon are (1) that the Supreme Court of the State of Michigan erred in sustaining the statute against the objection that it is in conflict with the Fourteenth Amendment to the Constitution of the United States in that it provides for the taking of property without due process of law; (2) that said court erred in sustaining the proceedings taken under said statute against the objection that they are in conflict with the fourteenth amendment to the constitution of he United States in that they deprived the complainants of property, without due process of law.

Under the first proposition, counsel contends that while the statute provides for notice to parties whose land is to be taken for the street, no provision is made for giving notice to the owners of land liable to be assessed for the improvement. Brief, p. 7.

In this, counsel is clearly mistaken.

Section 3395 directs that upon the filing of the petition in the condemnation proceedings in the court, that the clerk of the court shall issue a summonse against the respondents named in the petition, requiring them to appear before the court at the time named therein and show good cause why the prayer of said petition should not be granted. This notice, or summons is directed to the owners of and persons interested in the land proposed to be taken in the condemnation proceedings. This precedes the fixing of the assessment district, which cannot be fixed and determined until after the confirmation of the condemnation proceedings, as by Section 3406, it is provided that "when the verdict of the jury shall have been confirmed by the court * * * it shall be the duty of the clerk of the court to transmit to the common council * * * a certified copy of the verdict of the jury and of the judgment of confirmation * * * If the common council* * * believe that a portion of the city * * * in the vicinity of the proposed improvement will be benefited by such improvement, they may by an entry in their minutes determine that the whole or any just proportion of the compensation awarded by the jury shall be assessed upon the owners or occupants of the real estate deemed to be thus benefitted and thereupon, they shall, by resolution, fix and determine the district or portion of the city * * * benefitted and specify the amount to be assessed upon the owners or occupants of the taxable real estate therein."

This is fixing and determining the assessment district; Section 3406 further provides that "*the amount of the benefit thus ascertained shall be assessed upon the owners or occupants of such taxable real estate in proportion as near as may be to the advantage which such lot parcel, or subdivision is deemed to acquire by the improvement.*" "*The assessment shall be made and the amount levied and collected in the same manner and by the same officers and proceedings, as near as may be, as is provided in the charter of the municipality for assessing, levying and collecting the expenses of a public improvement when a street is graded.*"

The determination of the assessments district may, and often does, include lands outside of and other than lands affected by the condemnation proceedings. That is, the condemnation proceedings affect only such parcels as are taken in whole or in part. The assessment district takes in all territory which in the judgment of the common council may be benefitted by the opening of the street, in the vicinity of the proposed improvement; so that it is impossible to give notice in the condemnation proceedings to all persons who are likely to be assessed therefor, because the determination of the assessment district cannot be made until after the condemnation proceedings are ended. But the statute does contemplate that notice shall be given at some stage of the proceedings to all persons who are interested in lands within the assessment district and affected thereby, as indicated in the language above quoted, "that the assessment shall be made and the amount levied and collected in the same manner and by the same officers and proceedings, as near as may be, as is provided in the charter of the municipality for assessing, levying and collecting the expenses of a public improvement when a street is graded." No contention is made here but that the notice provided for by the charter of the City of Detroit of

the assessment and an opportunity to be heard before the board of assessors was not given.

This is the same notice referred to in the Voight vs. Detroit, case, recently heard in this court.

It is contended that the statute is unconstitutional because it authorizes the common council to fix and determine the district claimed to be benefited without providing for any hearing by the parties whose lands are included in the district as to whether all the lands benefited by the improvement are included in the district and whether the tax payers' land should be included in the district or not.

There is no force in this contention.

Davison vs. New Orleans, 96 U. S., 97,
County of Mobile vs. Kimball, 102 Id., 691,
Hager vs. Reclamation Dis., 111 U. S., 701,
Spencer vs. Merchant, 125 U. S., 349,
Walston vs. Nevin, 128 U. S., 578,
Williams vs. Eggleston, 170 U. S., 305.

In this last case, it is said by Mr. Justice Brewer, speaking for the court: "Neither can it be doubted that if the state constitution does not prohibit the legislature, speaking generally, may create a new taxing district, determine what property shall be considered as benefited by a proposed improvement. And in so doing, it is not compelled to give notice to the parties resident within the territory or permit a hearing before itself, one of its committees or any other tribunal, as to the question whether the property so included within the taxing district is, in fact benefited."

Paulson vs. City of Portland, 149 U. S., 30, an ordinance of the City of Portland was attacked because it assumed to determine arbitrarily and absolutely that the property within the prescribed district was benefited by the construction of a sewer without giving to the owners of the property any notice or opportunity to be heard upon that question, but the charter did provide for notice in case of street assessments and made the provisions applicable in case of sewers where the expense is ordered by the common council to be made a charge on the property directly benefited.

Mr. Justice Brewer said: "By ordinance, 5068, it ordered the construction of a sewer and directed what area should be drained into that sewer and created a taxing district out of that area. For these no notice or assent by the taxpayer was necessary. * * * By the same ordinance, the city also provided that the cost of the sewer should be distributed upon the property within the sewer district and appointed viewers to estimate the proportionate share which each piece of property should bear. Here, for the first time in proceedings of this nature where an attempt is made to cast upon his particular property a certain proportion of the burden of the cost, the taxpayer has a right to be heard."

As before stated, the charter of the City of Detroit provides for notice to persons assessed and an opportunity is given to be heard before the board of assessors. This question was fully discussed in briefs of counsel for the City of Detroit in Voigt vs. Detroit.

Upon such hearing before the assessors, sitting as a board of review, the taxpayer no doubt has a right to be heard upon the question whether his property is benefited to the extent to which it is assessed, or whether it is benefited at all, but he has no right to be heard upon the determination of the extent of

the territory to be embraced within the assessment district. This is purely a legislative question, as decided in the last case cited, and is fully discussed in my brief in Voigt vs. City.

III.

Counsel contends that the resolution fixing the assessment district does not expressly state that the property included therein is benefited to the amount ordered to be assessed upon such district.

The resolution declares that "the common council of the City of Detroit do hereby fix and determine that the following district and portion of said City of Detroit is benefited by the opening of Milwaukee Avenue from Chene Street to Mr. Elliot Avenue, where not already opened, and further resolved that there be assessed and levied upon the several pieces and parcels of real estate included in the above description the amount of $15,214.75, in proportion, as near as may be, to the advantage which such lot or parcel is deemed to acquire by such improvement." (Rec., p. 3-4.)

I think such determination is clearly apparent from the language of the resolution and is a substantial compliance with the statute. The resolution determines that the property "was benefited." It then directs "an assessment to be levied upon each piece or parcel, in proportion as near as may be" is deemed to acquire by making such improvement.

Is it not clear that if each lot is assessed in accordance with the benefit derived from the improvement, that all the lots together are assessed in accordance with the benefits received?

Again, it will be noticed that the resolution referring to the assessment on each lot ends with the phrase, "*in accordance with*

the amount of benefit derived from such improvement." If each lot was assessed in accordance with the amount of benefit derived from such improvement, no owner of such lot is entitled to complaint. In fact, there is no complaint that any lot is unfairly or unjustly assessed, nor that the resolution does not provide for a fair assessment nor that the lots assessed are not benefited to the amount of such assessment by reason of the opening of the street, but it is asserted that it simply omits to state that the whole added ogether is in accordance with the benefit to the whole district.

IV.

Counsel contends that one piece of property was defectively described in the condemnation proceedings. Brief, p. 18.

If this question can be considered here, it would be sufficient to point out that a clerical error was no doubt made in one of the descriptions where a line was runS. 64 degrees west, when it should read "N. 64 degrees east."

That the error is a clerical one is made manifest by reference to Ex. B. Rec., pp. 12-13, which was a plat of the lands affected by the condemnation proceedings, which show an accurate description of the land proposed to be taken, and this plat would correct any error there might bein the written description of the parcel referred to. This was the view taken by the Supreme Court of Michigan in its opinion, Rec., p. 21. But such questions were settled by the confirmation of the report and verdict of the jury in the Recorder's Court. That court had jurisdiction of the parties and the subject matter; its judgments cannot be collaterally attacked except for questions affecting its jurisdiction.

The rule is well established by the decisions of this court in Vorhees vs. Jackson, 10 Pet., 449, where it is said:

> "When proceedings of a court of competent jurisdiction are brought before another court collaterally, they are by no means subject to all the exceptions which might be taken to them on direct appeal. The general and well settled rule of law in such cases is that, when the proceedings are collaterally drawn in question, and it appears on the face of them that the subject matter was within the jurisdiction of the court, they are voidable only. The errors and irregularities of any sort are to be corrected by some direct proceedings, either before the same court to set them aside, or in an appellate court. If there is a total want of jurisdiction, the proceedings are void and a mere nullity, and confer no right and afford no protection, and may be rejected when collaterally drawn in question. But the principle that every act of a court of competent jurisdiction shall be presumed to have been rightly done till the contrary appear, applies as well to every judgment or decree rendered in the various stages of the proceeding of a court of general jurisdiction, from the institution to their completion as to the final judication. Every matter adjudicated, becomes a part of their record, which thenceforth proves itself, without referring to the evidence on which it has been adjudged. Hence the order of a court of general jurisdiction confirming a sale under attachment, upon inspection of the return, is conclusive in any collateral action o nthe question of the validity of the sale. It may be conceded that the requirements of the statute in reference to the mode of proceeding are conditions precedent to a valid sale; but it is not essential that the record should set forth the various steps necessary to the performance of such conditions. A sale cannot be declared a nullity in a collateral action, because the record does not show affirmatively the evidence of a compliance with the terms prescribed by law in making such sale."

See also to the same effect Moore vs. Greene, 19 How., 69; Ramson vs. Williams, 2 Wall., 313; Comstock vs. Crawford, 3 Wall., 396.

It is respectfully submitted that the decree of the Supreme Court of the State of Michigan should be affirmed.

TIMOTHY E. TARSNEY,

Counsel for defendants in error.

Supreme Court of the United States.

No. 123.—October Term, 1901.

John C. Goodrich et al., Plaintiffs in Error, vs. The City of Detroit. } In error to the Supreme Court of the State of Michigan.

[March 3, 1902.]

This was a bill in equity filed in the circuit court for the county of Wayne by Goodrich and another against the city of Detroit and its treasurer, to enjoin the defendants from enforcing the collection of certain taxes assessed upon several parcels of property owned by the plaintiffs, for benefits derived from the opening of Milwaukee avenue, upon the ground, amongst others, that such assessment was in violation of the Fourteenth Amendment, and deprived plaintiffs of their property without due process of law.

These proceedings were taken under the authority of certain sections of the Compiled Laws of 1897, printed in the margin.*

*"Sec. 3394. The city, village or county clerk shall make and deliver to such attorney, as soon as may be, a copy of such resolution certified under seal, and it shall be the duty of such attorney to prepare and file in the name of the city, village or county, in the court having jurisdiction of the proceedings, a petition signed by him in his official character and duly verified by him; to which petition a certified copy of the resolution of the common council board of trustees or board of supervisors shall be annexed, which certified copy shall be *prima facie* evidence of the action taken by the common council, board of trustees or board of supervisors, and of the passage of said resolutions. The petition shall state, among other things, that it is made and filed as commencement of judicial proceedings by the municipality or county in pursuance of this act to acquire the right to take private property for the use and benefit of the public, without consent of the owners, for a public improvement, designating it, for a just compensation to be made. *A description of the property to be taken shall be given* and generally the nature and extent of the use thereof, that will be required in making and maintaining the improvement shall be stated and *also the names of the owners and others interested in the property, so far as can be ascertained, including those in possession of the premises.* The petition shall also state that the common council or board of trustees or board of supervisors has declared such public improvement to be necessary, and that they deem it

The proceedings in the case were substantially as follows: On November 14, 1893, a resolution was passed by the common council providing for the opening and extending of Milwaukee avenue, and on January 6, 1894, a petition by the city was filed in the recorder's court, together with a map or plan of the private property proposed to be taken, certified as correct by the city engineer. The owners and persons interested in the real estate proposed to be taken were duly summoned; a jury impanelled, a hearing had, and a verdict rendered condemning certain lands, and fixing the total amount of damages at $15,214.75. This verdict was confirmed by the court.

Thereafter, and on August 7, 1894, a resolution was adopted by the common council, which was rescinded on November 20, and on January 22, 1895, another was adopted of which the following is a copy:

"Resolved, that the said common council of the city of Detroit do hereby fix and determine that the following district and portion of said city of Detroit, to wit: (Here follows list of descriptions, many of which are different from those in first assessment district) is benefited by the opening of Milwaukee avenue, from Chene street to the easterly city limits, where not already opened. And further resolved, that there be assessed and levied upon the several pieces and parcels of real estate included in the above descriptions, the amount of $15,214.75, in proportion, as near

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necessary to take the private property described in that behalf for such improvement for the use or benefit of the public. *The petition shall ask that a jury be summoned and empaneled to ascertain and determine whether it is necessary to make such public improvement, whether it is necessary to take such private property as it is proposed to take, for the use or benefit of the public, and to ascertain and determine the just compensation to be made therefor.* The petition may state any other pertinent matter or things and may pray for any other or further relief to which the municipality or county may be entitled within the objects of this act.

"SEC. 3395. *Upon receiving such petition, it shall be the duty of the clerk of said court to issue a summons against the respondents named in such petition,* stating briefly the object of said petition, and commanding them, in the name of the people of the State of Michigan, to appear before said court, at a time and place to be named in said summons, not less than twenty nor more than forty days from the date of the same, *and show cause, if any they have, why the prayer of said petition should not be granted.*

"SEC. 3399. *The jury shall determine in their verdict the necessity for the proposed improvement and for taking such private property for the use or benefit of the public for the proposed improvement, and in case they find such necessity exists they shall award to the owners of such property and others interested therein such compensation therefor as they shall deem just,*" &c.

Section 3406, which is also pertinent, is reprinted in full in *Voigt* v. *City of Detroit* (*ante*, p. ——.)

as may be, to the advantage which each lot or parcel is deemed to acquire by this improvement. And further resolved, that the board of assessors of the city of Detroit be, and they are hereby, directed to proceed forthwith to make an assessment roll in conformity with the requirements of the charter of the city of Detroit relating to special assessments for collecting the expense of public improvements when a street is graded, comprising the property hereinbefore described, upon which they shall assess and levy the amount of $15,214.75, each lot or parcel to be assessed a ratable proportion, as near as may be of said amount, in accordance to the amount of benefit derived by such improvements."

On March 12, 1895, the assessors reported an assessment roll for defraying the expenses of opening the avenue, which was affirmed by the common council April 4, 1895. The property of plaintiffs was included in the assessment district, which was fixed and determined by the common council.

Defendants filed an answer, which was a little more than a demurrer to the bill, and upon hearing upon pleadings and proofs the bill was dismissed, an appeal taken to the Supreme Court, by which the decree of the circuit court was affirmed. (123 Mich. 559.)

Mr. Justice BROWN delivered the opinion of the Court.

This case raises the question whether certain proceedings taken under the Compiled Laws of Michigan for the assessment of benefits upon neighboring lots derived from the opening of Milwaukee avenue, in the city of Detroit, deprived the owners of such lots of their property without due process of law.

These proceedings began with a resolution of the common council declaring the necessity of opening the street. Thereupon the city petitioned the recorder's court for a jury to determine the necessity of such improvements and of taking private property, (a map or plan of which was annexed to the petition,) and "to ascertain and determine the just compensation to be made for such private property proposed to be taken," and for the issue of a summons to all persons mentioned in the petition as being interested in the property proposed to be taken. The jury returned a verdict in favor of the necessity of opening the avenue, of taking private property therefor, and fixed the compensation at the aggregate sum of $15,214.75.

Thereupon the common council passed another resolution fixing the district benefited by the opening, and declaring that there should be assessed upon the real estate included in such district

the sum of $15,214.75, "in proportion, as near as may be, to the advantage which each lot or parcel is deemed to acquire by this improvement." The resolution further required the board of assessors to make an assessment roll to that amount, assessing upon each lot "a ratable proportion, as near as may be, of said amount in accordance to the amount of benefit derived by such improvements." Thereupon the matter was referred to the board of assessors, who reported the amount assessed against each lot. The bill averred that none of the plaintiffs' land thus assessed abutted upon those parts of the street opened by these proceedings, but that they had already dedicated to the city all that portion of Milwaukee avenue lying in front of their lands, without cost or expense to the city.

Plaintiffs made a large number of objections to the validity of such asssessmeut, none of which require to be noticed, except so far as they are pertinent to the provision of the Fourteenth Amendment, concerning due process of law.

1. The first of these objections is that while the statute provides for a notice to the parties whose land is to be taken for the street, no provision is made for giving notice to the owners of the land liable to be assessed for the improvement. Section 3394 provides for the filing of a petition by the city attorney for the condemnation of land, and that the petition, among other things, shall contain "a description of the property to be taken, . . . also the names of the owners and others interested in the property, so far as can be ascertained, including those in possession of the premises." Section 3395 provides that, "upon receiving such petition, it shall be the duty of the clerk of said court to issue a summons against those named in such petition," that is, all interested in the property to be taken, "commanding them, . . . to show cause, if any they have, why the prayer of such petition should not be granted."

It will be observed that this section makes no express provision for notice to the owners of property *not* to be taken, but *assumed to be benefited* by the improvements. These owners, however, are not then known, because the proceedings for the condemnation of the property taken precedes the determination of the benefits and the fixing of the assessment district. The sections of the statute taken together provide for two distinct and separate proceedings: (1) for the assessment of compensation for property

taken, and (2) for the assessment of benefits to property *not* taken. In the former, only the owners of the land taken are interested. *Their* rights are amply protected by sections 3394 and 3395, requiring notice to be given to show cause why the petition should not be granted.

The argument of the plaintiffs is that the owners of the property liable to be assessed for the *benefits* are just as much interested in the question as to the necessity of making the improvement and the amount of compensation as are the owners of land to be taken for such improvement, and the same reasons for notice apply in the one case as in the other. A number of cases are cited which, it is argued, give countenance to this position. (*Hall* v. *Detroit*, 32 Mich. 108; *Commissioners* v. *Fahlor*, 132 Ind. 426; *The State* v. *Fond du Lac*, 42 Wis. 287; *Stuart* v. *Palmer*, 74 N. Y. 183; *Scott* v. *Toledo*, 46 Fed. Rep. 385.)

But whatever weight be given to these authorities, the law in this court is too well settled to be now disturbed, that the interest of neighboring property owners, who may possibly thereafter be assessed for the benefit to their property accruing from opening a street, is too remote and indeterminate to require notice to them of the taking of lands for such improvement, in which they have no direct interest. The position of the plaintiffs in this particular would require a readjustment of the entire proceedings, and a determination of the property incidentally benefited, before any proceedings are taken for the condemnation of land directly taken or damaged by such improvement. It might be argued upon the same lines that, whenever the city contemplated a public improvement of any description, personal notice should be given to the taxpayers, since all such are interested in such improvements and are liable to have their taxes increased thereby. It might easily happen that a whole district or ward of a particular city would be incidentally benefited by a proposed improvement, as, for instance, a public school, yet to require personal notice to be given to all the taxpayers of such ward would be an intolerable burden. Hence it has been held by this court that it is only those whose property is proposed to be *taken* for a public improvement that due process of law requires shall have prior notice.

Thus in *Spencer* v. *Merchant*, (125 U. S. 345,) it was held that, if a State legislature direct the expense of laying out a street to

be assessed upon the owners of lands benefited thereby, and also determine the whole amount of the tax and what lands are, in fact, benefited, and provides for notice to and hearing of each owner, at some stage of the proceedings, upon the question what proportion of the tax shall be assessed upon his land, there is no taking of property without due process of law. Said Mr. Justice Gray (p. 356): "But the legislature has the power to determine, by the statnte imposing the tax, what lands, which might be benefited by the improvement, are in fact benefited; and if it does so, its determination is conclusive upon the owners and the courts, and the owners have no right to be heard upon the question whether their lands are to be benefited or not, but only upon the validity of the assessment, and its apportionment among the different parcels of the class which the legislature has conclusively determined to be benefited." So, in *Parsons* v. *District of Columbia*, (170 U. S. 45,) it was held that an enactment by Congress that taxes levied for laying water mains in the District of Columbia should be at a certain rate per front foot against all lots or lands abutting upon the street in which the main should be laid, was conclusive alike of the necessity of the work and of its benefit to all abutting property. So, also, it was said in *Williams* v. *Eggleston*, (170 U. S. 304, 311): "Nor can it be doubted that, if the State constitution does not prohibit, the legislature, speaking generally, may create a new taxing district, determine what territory shall belong to such district, and what property shall be considered as benefited by a proposed improvement. And in so doing it is not compelled to give notice to the parties resident within the territory or permit a hearing before itself, one of its committees, or any other tribunal, as to the question whether the property so included within the taxing district is in fact benefited." (Cooley on Taxation 2d ed. p. 149.)

This question, however, is decided in the case of *Voigt* v. *The City of Detroit*, recently disposed of, and will not be further considered here. Indeed, so far as this question is concerned, this case might be affirmed upon the authority of that.

2. The second objection is that the resolution of January 22, 1895, fixing the assessment district and levying a gross amount thereon for benefits, does not expressly state that the property included therein is benefited to the amount ordered to be assessed. This resolution was passed in pursuance of section 3406,

reprinted in the Voigt case, (*ante*, p. ——,) which provides that "if the common council . . . believe that a portion of the city . . . will be benefited by such improvement, they may . . . determine that the whole or any just proportion of the compensation awarded by the jury shall be assessed upon the owners or occupants of real estate deemed to be thus benefited and thereupon they shall by resolution fix and determine the district or portion of the city . . . benefited, and specify the amount to be assessed upon the owners or occupants of the taxable real estate therein. The amount of the benefit thus ascertained shall be assessed upon the owners or occupants of such taxable real estate, in proportion, as nearly as may be, to the advantage which such lot, parcel or subdivision is deemed to acquire by the improvement."

The resolution declares that the "common council do hereby fix and determine that the following district . . . is benefited by the opening of Milwakee avenue," . . . and "that there be assessed and levied upon the several pieces and parcels of real estate, included in the above description, the amount of $15,214.75, in proportion, as near as may be, to the advantage which each lot or parcel is deemed to acquire by this improvement." If this resolution be not a literal, we think it is a substantial, compliance with the statute, declaring that if the common council *believe* that the property will be benefited by such improvement, they may determine the proportion of the compensation to be assessed upon the owners; but whether this be so or not, there was no want of due process of law within the Fourteenth Amendment, inasmuch as section 3406 expressly provides, following the language already quoted, "that the assessment shall be made and the amount collected in the same manner and by the same officers and proceeding, as near as may be, as is provided in the charter of the municipality for assessing, levying and collecting the expense of a public improvement when a street is graded." Interpreting this, the Supreme Court of Michigan held in the case of *Voigt* v. *The City of Detroit*, (123 Mich. 547,) that "the statute provides for a hearing in relation to the proportion each piece of property shall bear to the whole cost of the improvement;" and further, that "when the proceeding has reached that stage when it becomes necessary to decide what proportion of the cost of a proposed improvement shall be assessed to any given description of land, there must be an opportunity given to the

owner of the land to be heard upon that question." There was, in that case, as well as in the one under consideration, no claim in the bill that plaintiffs' property was not benefited by the proposed improvement in excess of the amount assessed, nor was there any claim that he was not allowed to be heard in relation to the amount which should be assessed against his property. Upon such hearing the property owner may insist that his property was not benefited to the amount assessed, or that it was not benefited at all, and thus obtain every advantage which he might obtain were he informed of every step of the proceedings. The terms of the resolution, that each lot shall be assessed "in accordance with the amount of benefits derived from such improvements," opens the whole question of the amount of benefit derived by the lot, even to showing that no benefit whatever was occasioned by the improvement. It does not follow, however, that he has a right to be heard upon the extent of the territory to be embraced within the assessment district.

3. The last objection, that there were several of the parcels of land constituting the extension of Milwaukee avenue so defectively described that the judgment of condemnation was absolutely void, is untenable. Not only is it not shown that the plaintiffs were interested in the lands alleged to be misdescribed, but it is obviously impossible, in a proceeding to assess benefits upon other property, to show a misdescription in the lands taken for such improvement. (*Voorhees* v. *Bank of United States*, 10 Pet. 449; *Comstock* v. *Crawford*, 3 Wall, 396.) It is not only an attempt to raise the question collaterally by one who has no interest in it, but it is exceedingly doubtful if a simple misdescription involves any Federal question whatever. The errors, too, were merely clerical, since a map of the property taken, annexed to the condemnation proceedings, exhibits accurately the lands affected thereby.

There was no error in the decree of the Supreme Court affirming the dismissal of the bill, and it is therefore

Affirmed.

Mr. Justice HARLAN did not sit in this case.

True copy.

Test:

Clerk Supreme Court, U. S.